Socialist Representative Institutions

BY

OTTÓ BIHARI

AKADÉMIAI KIADÓ, BUDAPEST

OTTO BIHARI

SOCIALIST REPRESENTATIVE INSTITUTIONS

The work discusses important state organizational questions of socialist States (mainly European socialist States) — the competence, actual operation of their representative organs of state power as well as the relationships of these to other state organs.

The presentation of not only the general structure of representative institutions, but also their distinguishing features, is a special merit of the book, which is a modern comparative law study, a political work, concerned with new endeavours and recent developments that are now characteristic of socialist legislations and science of law. Its subject has assumed prominence by the fact that the modernizing of the representative institutions is very often an attempt to reform state organizations and to further the development of socialist democratism in the various socialist States today.

Socialist Representative Institutions may be of interest to university lecturers and graduates who deal with constitutional law, politics, and those who are working in administration practice.

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by

Professor OTTÓ BIHARI LL. D.

University of Pécs (Hungary)

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Translated by

JÓZEF DESÉNYI

Translation revised by

IMRE MÓRA

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CHAPTER ONE

PRINCIPAL BOURGEOIS DOCTRINES OF THE STRUCTURE OF POLITICAL ORGANISM

1. SOME PROBLEMS OF A COMPARISON

The science of comparative constitutional law cannot achieve results unless it offers the comparative presentation of the growth of its institutions in the course of history. This way of approach must be followed even though, owing to the class content of the State and its functions, the institutions of a given, earlier period of history will necessarily differ from the institutions of a present socialist State. Furthermore, this consideration must always be kept in mind, since otherwise the scientific analysis should create an impression in a superficial observer as if there were some sort of continuity between an institution of a socialist State actually under study and a capitalist institution, resembling it on the surface only. A comparison of this sort would be particularly luring for those who are prone to judge of capitalist legal and political institutions, and contrast them with socialist governmental organs exclusively on the ground of positive law. The resultfulness of a totally positivist analysis is argued even by modern bourgeois jurisprudence. Many of the Western scholars of law, if by fits and starts only, without a faith and will to discover the objective truth, are in search of the social background and the social reality behind the—often—propagandistic guise of the legal rules. Those who make a comparison e.g. in Hungarian history, on the ground of formal signs only (by demonstrating exclusively the legal rules of the capitalist State by ignoring the class will lurking behind them), between the bourgeois legislative assembly and the modern socialist legislative assembly, between the local government systems burdened with the remnants of the feudal State, and the socialist councils, at the same time wilfully shut their eyes, e.g., to the antidemocratic traits in the earlier Hungarian electoral system.

Historical comparisons play a significant, one may say irreplaceable,

role in jurisprudence, however, they can achieve satisfactory results only if the sphere of their bases is not restricted to positive norms, or legal rules, but covers the underlying economic and social conditions as well.

In a socialist State the representative organs discharge functions which in a bourgeois State no governmental agency discharges exclusively by itself. Here the task of the comparison is precisely to collate the various governmental agencies of the bourgeois State with the types of organs existing within the socialist governmental organization. When the bourgeois principles of the structure of a governmental body are discussed, in the first place the principles that are worthy of attention on these considerations, i.e. in a horizontal analysis, are those of the division of power between the legislative and the executive organs, while in a vertical analysis, the principles of the mutual relations of the central and local, mainly autonomous bodies, the definition of the competences and cognizances, and in this connexion the definition of the function and character of the regional autonomous bodies.

The study of the individual questions precedes, or follows, the way of approach referred to above. Before an attempt is made to outline the structural principles of governmental organizations, problems relating to state sovereignty (internal sovereignty) will have to be dealt with. These are preliminary questions of the division of governmental organizations and their structural build-up while at the same time the question of sovereignty, as will be made clear subsequently, refers to the economic and social basis and its position in the given historical period.

2. SOVEREIGNTY AND POPULAR SOVEREIGNTY IN THE AGE OF BOURGEOIS ENLIGHTENMENT AND AFTER THE BOURGEOIS REVOLUTION

The appearance of the idea of sovereignty coincided in Western Europe with the beginning of the capitalist economy. When the State of feudal disunity began to disintegrate, and the united national State was forming, the prince, who concentrated in his hands the full sovereignty — the absolute monarch became the symbol of the united

national State. The monarch's struggle with the retarding forces of the feudal aristocracy was to go on for centuries, now in an open political, now in a religious guise. In this fight, with feudal disunity and legal insecurity (which were prejudicial to the interests of the bourgeoisie) as well as arbitrary aristocracy on one side, and the monarch (which was striving for absolute power) on the other side, in England and France the bourgeoisie sided with the monarch. It followed from this tendency that the most prominent literary men of the bourgoisie, in the first place its lawyers, tried to justify the absolute monarchy. The first European lawyer of considerable influence in this respect was the Parisian advocate Jean Bodin (1530–1596), who in 1576, the year of publication of his most famous work *Six livres de la République*,[1] was a representative of the *Tiers État* in the *État Générale* convened in Blois. Bodin defines state sovereignty as "*summa in cives ac subditos legibusque soluta potestas*", as the right of the king limited only by law, divine and natural.[2] By this definition Bodin set the rights of the State, i.e. the Prince, against the claims of the Church and the Holy Roman Empire, however, at the same time also against the disuniting feudal forces. By this new doctrine of sovereignty he wanted to demonstrate that the condition of any governmental order was the existence of an authority in a given centre which wielded power and actually disposed of it. The principle of sovereignty as the right of the sovereign to exercise autocratic power thus appeared at a time when the French bourgeoisie, then in its youth, attempted to achieve its chief goals by the path of monarchical absolutism.

At the time the French Bodin merely raised the idea of monarchical, royal sovereignty, on the throne of England Queen Elizabeth sat. In England the absolute power of the ruler had gathered strength for many decades already, and the bourgeoisie was still content with the achievements of the absolutism of the prince and the concessions the prince had granted it. However, in about a century the problems of the need for royal power would come under dispute, although neither English society, nor the Long Parliament itself was republican.[3] In the 17th century the claims, even when stressed to the utmost, never went

[1] I. Bodinus, *De Republica libri sex*, Frankfurt 1954, p. 123.

[2] I. Bodinus, *Op. cit.*, p. 167.

[3] A. L. Morton, *A People's History of England*, Seven Seas Publishers, Berlin 1965, p. 228

beyond the limitation of the royal prerogative, and the initiation of the merchant class into the practice of governmental power. After the brief spell of the revolution led by Cromwell, the Restoration of 1660 brought about a solution of the problem in the monarchical sense. At that time it was Hobbes who proclaimed the ideology of an unlimited, absolute monarchy.[4] The monarch—he affirmed—was vested with unlimited rights by the population. In his opinion, the monarch is the holder of the fullness of sovereignty, who wields the principal, unrestricted sovereignty: "he that carryeth this the person is called sovereign; and said to have *sovereign power* and every one besides, his *subjects*." According to Hobbes sovereignty is one and indivisible. It is concentrated in the hands of the head of State.

The Glorious Revolution created an altogether new situation and, following from this, a new theory of sovereignty. The doctrine of sovereignty was the mirror of English reality, which reflected the division of power between Parliament and Sovereign. In fact, by holding the view that the legislative power should preferably be divided among different persons, John Locke (1632–1704) formulated the principle of 'King in Parliament'.[5] Moreover, against the Sovereign even the *ius resistendi* was justified in his belief, for although the Sovereign disposed of the principal power, he was nevertheless subject to the law.

This way of dividing sovereignty among several agencies was an indication of gradual progress of the bourgeois claims. By the end of the 17th century the capitalist bourgeoisie, which in the mid-16th century still takes shelter in the shade of the absolute monarchy, will have attempts to penetrate into the last stronghold of the feudal class, i.e. to conquer part of the governmental power. The economic back-

[4] Thomas Hobbes, *Leviathan*, Encyclopaedia Britannica, Inc. Chicago, London, Toronto, Part II, Of Commonwealth, Chap. XVII, 1952, p. 101.

[5] J. Locke, *Two Treatises on Government*, Cambridge University Press, 1960, Second Treatise, Chap. XII. 143, pp 382 and 383. — "Therefore in well order'd Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative* Power is put into the hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good."

ground of this evolution stands out clearly. Economic power had been centred in the City of London for long, and royal power itself, the armed forces, the budget, all depended on the benevolence and subsidies of the London merchants and bankers. Therefore, the term King in Parliament in the first phase accurately reflected the fact of dividing sovereignty. It was not parliamentary sovereignty on which Locke insisted. Theoretically his Two Treatises, published after the Glorious Revolution, were intended to sanction the achievements of the Revolution. What Locke practically thought of was a well-ordered, a moderate monarchy, where power, i.e. sovereignty, was divided.[6]

The term King in Parliament precisely expressed the state of equilibrium that was characteristic of the governmental organization of England during a period of transition following the Glorious Revolution. The transition period did not last for long. At the time of William III the struggle for power between King and Parliament was decided although not yet in a form of definitive order. In fact it was to become established in the form of a parliamentary monarchy only later, during the reign of the House of Hanover. The Bill of Rights of 1689 abolished the absolute royal prerogatives, i.e. legislation without Parliament, the suspension of the enforcement of the Acts of Parliament, exemptions granted to certain persons from under the law, etc., and established the constitutional monarchy. In this monarchy the formula King in Parliament in fact has become meaningless, for as a result of the division of the exercise of sovereignty it has turned in England into a parliamentary sovereignty (where, however, the old traditional forms have been lingering on on the surface).

After the Glorious Revolution the theory of sovereignty and of the limitation of the sphere of royal power for the benefit of Parliament at the same time demanded a re-distribution of governmental functions. This question will be discussed when the doctrines on the branches of the executive power will be examined. However, it should be remembered already at this point that the division of sovereignty, or more accurately, the division of the exercise of sovereignty, was the underlying principle of the distribution of the governmental functions, and not conversely, as several representatives of the bourgeois

[6] *Ibid.* Chap. XIII. 149, p. 383.

science of constitutional law, so Max Imboden, would have it.[7] The actual govermental duties, in conformity with the social and political exigencies of the age, determined the division of the principal sovereignty. Locke by distinguishing the legislative and executive powers, or the prerogative, gave expression to the reality of his age. It was from this reality whence he drew the generalizations for the governmental functions. And this is the significance and strength of Locke's construction.

The other great representative of the theory of bourgeois constitutional law, Montesquieu, added practically little new material to the problem of sovereignty. Between 1729 and 1731, when Montesquieu was in England, and in the forties of the 18th century, when he wrote his *De l'esprit des lois*, conditions in France were in certain respects very much the same as in pre-revolutionary England: a rich bourgeoisie, an aristocracy drifting towards the capitalist way of life, financial disorder, royal absolutism, i.e. all that bourgeoisie was displeased with. In the same way as a century before in England, the bourgeoisie was eager to penetrate into the executive power, or conquer at least part of it. Although it cannot be presumed that during his two-year stay in England Montesquieu could assess all achievements of the struggles of the past three decades, in particular when the extreme complexity and the traditional forms of the English governmental and legal systems are remembered, still it may be taken for granted that his keen eye, always observing the sum total and general behind the details, discovered the potentialities of the theory of sovereignty as formulated by Locke. This at least comes to light from passages of his work where he often and immoderately praises conditions in England.

In the French edition of Montesquieu's *De l'esprit des lois*, mostly in notes to Chapter 11 of Book Six, reference is made to the circumstance that the ideas set forth in that Chapter are mostly excerpts from Locke, or that Montesquieu was inspired by Locke's Treatise on Civil Government, when he wrote that Chapter. The former statement has to be dismissed in particular when a comparison is made between the relevant passages of Locke and Montesquieu. (This will

[7] Max Imboden, *Montesquieu und die Lehre der Gewaltentrennung*, Berlin 1959, p. 11.

be discussed extensively in the section on the branches of the executive power.) However, there is no doubt, Montesquieu was a worthy disciple of the realistic Locke also in that he was able to assess changes that took place during the half century between 1690 and 1740. (At the end of the period it was a member of the Hanoverian dynasty, and not William of Orange, who was the king and who was fully dependent on Parliament.) Montesquieu drew exactly accurate conclusions as to the results that could be eventually produced by the moderate theories of the English bourgeoisie within a few decades. Nevertheless, there are many authorities, among them such as Seignobos, who from the picture Montesquieu presented of England infer that he was not acquainted with English reality. (There is but one common point of contact between English practice and the description of Montesquieu and this is the number three.[8])—This is argued by a fair number of writers of the present day. They praise Montesquieu for his deliberateness, and mention that Montesquieu was well acquainted with the seamy sides of English constitutional life and yet he went out in praises for the constitutional evolution in England, by keeping in mind all that was progressive and rejecting all that might have spoiled the picture.[9] In fact, if Montesquieu followed political ends by writing his *De l'esprit des lois*—and who would deny this—before transplanting anything from the English system he had to infer on what could be approved of and what he considered important for France. So he certainly could not become a mere copyist, or epigon of Locke. What he did was to integrate changes he considered worthy of imitation into the volumes of his *De l'esprit des lois*, in particular in the famous Chapter 11 of Book Six.

On the other hand he refrained from introducing new notions where these were not needed. He relied on Locke's theory of sovereignty, but he spared the readers of a new exposition of the theory. There is only a single passage in his book where he speaks of the exercise of power, essentially of sovereignty in a generalizing way. (The monarch moderates his power when he confers it on others, divides his authority in a way that he would never transfer part of it to others without

[8] Ch. Seignobos, La séparation des pouvoirs. *Études de politique et d'histoire* 1934, p. 184.

[9] Max Imboden, *Op. cit.*, p. 5.

keeping the larger share for himself.[10]) In conformity with his political ideas, Montesquieu took over the heritage of the ideologies of the English Glorious Revolution, and he did so knowingly, not superficially, in order to achieve a change in the conditions in France. It should be mentioned here that, admittedly, it was not his ideas of sovereignty that had a revolutionary effect in France—and through his readers (who could not be daunted even when his book was put on the Index) in America—but rather his theory of the segregation and the balance of the branches of sovereignty, to be discussed later.

We shall now skip over from this problem to another associated with sovereignty, which, however, is not attached to the name of Montesquieu but to another great spirit of the age, Rousseau. He made the problem of the principal power, the sovereign and sovereignty, one of the fundamental questions of his work *Du contrat social.* Here the sovereign ceases to be a person. It is rather a political body invested with the legislative power as a whole. This was an extremely striking, significant change, since for its origin, the term sovereign had been undisputably associated with the sovereign king, the person of the monarch ever since Bodin. With Bodin and Hobbes the theory of sovereignty itself was a newly invented notion for possibly supporting the justification and even the necessity of the absolute monarchy. In Rousseau's work it was exactly this trait which disappeared.

Du contrat social came into existence at a time when the monarchy, and in particular the absolute monarchy, was exposed to criticism to such an extent that in a few years a mortal wound was to be inflicted on it.

A year before the publication of *Du contrat social* the first volume of the Great Encyclopaedia had come out, furthermore, what was of even greater importance, the growing economic crisis so to say swept away the monarchical ideas, the religious and other theories. While Montesquieu, following Locke as his guide, studied the compromise in the wake of the English revolution and tried to transplant its

[10] Montesquieu, *De l'esprit des lois*, Vol. V, Chap. XVI, Librairie de L. Hachette et Cie, 1865, p. 181.—"... le monarque, en le (sc. pouvoir) donnant, le tempère. Il fait une telle distribution de son autorité, qu'il n'en donne jamais une partie, qu'il n'en retienne une plus grande."

results into French soil, Rousseau was the echo of the spirit of the years before the French Revolution itself. Rousseau has no scruples. He criticizes English parliamentarism, and the English constitution, in sharper terms than Montesquieu. (The English people believes itself to be free, still it is strongly mistaken; it is free only at the time when the members of Parliament are elected: no sooner they are elected than it is a people of serfs again and ceases to count anything. It uses the brief moments of its freedom in a way that it deserves the loss of its freedom.[11]) From the very beginning Rousseau had a serious advantage over many a political writer of his age: for him the monarchy was not irreplaceable, he could imagine political life without sovereignty concentrated in the hands of a monarch, consequently a single person. The Geneva of his early youth, then later the idealised Geneva of his fancy[12] trained him to become republican in the sense that nothing tied him to any monarchical system, moreover he came into conflict with it. Any prerogative was odious to him. (In the dedication of his work addressed to the Republic of Geneva he writes that when a single man only is not subject to the law, all other inhabitants will necessarily subject themselves to him.[13])

It was not the rejection of the idea of sovereignty, quite contrary, it was the guarantee of vesting sovereignty in its right carrier that was becoming a true revolutionary aim at that moment. According to Rousseau, the exercise of sovereignty was an expression of will, and for that matter of the general will, i.e. legislation. According to him the legislative power belonged to the people and could not belong to anybody else.[14] In the place of royal sovereignty, the ideas that sovereignty concentrates in the hands of a king, here turns up the

[11] J.-J. Rousseau, *Oeuvres complètes*, Vol. II, Deux-Ponts 1792, p. 134. — "Le peuple Anglois pense être libre; il se trompe fort, il ne l'est que durant l'élection des membres du Parlament; si-tôt qu'ils sont élus, il est esclave, il n'est rien. Dans les courts moments de sa liberté, l'usage qu'il en fait mérite bien qu'il la perde."

[12] J.-J. Rousseau, *Op. cit.* Vol. I. pp. 10–4. (Dedication). — "Discours sur l'origine et les fondemens (sic) de l'inégalité parmis les hommes."

[13] J.-J. Rousseau, *Op. cit.* Vol. I, p. 11. — ". . . s'il s'y trouve un seul homme qui ne soit pas soumis à la loi, tous les autres sont nécessairement à la discrétion de celui-là."

[14] J.-J. Rousseau, *Op. cit.* Vol. II, p. 78. — ". . . la puissance législative appartient au peuple, et ne peut appartenir qu'à lui."

idea of popular sovereignty. Rousseau's construction of the term wants to demonstrate that sovereignty, which is public will, the manifestation of the general will, has always been the people's, but the ruler continually attempts to suppress the people's sovereignty, thus infringing the social contract. In Rousseau's opinion the ruler eventually succeeds in his endeavour and it is by this way that the government is degenerating.

Rousseau rejected the idea of vesting sovereignty either generally, or provisionally, in a single person. As he said, supreme power, sovereignty, could not be alienated, and the sovereign as a collective being can be represented only by itself, with the proviso, that power can be transferred to others, still, the will cannot.[15] He developed this idea into the indivisibility of sovereignty, where again the notion of sovereignty referred to the will, and not to the exercise of power. This is expressed as this: will is common, or it is not; it is the will of the entirety of the people, or only part of it. In the first case the will declared is the will of the supreme power and has legal force.[16] Here it also becomes evident at what point Rousseau agreed with Hobbes, and that he agreed with him from another position. Hobbes made use of the principle of the unity and indivisibility of sovereignty in order to justify the claims of the absolute monarchy, whereas with Rousseau the principle bolstered up the idea of popular sovereignty. Hobbes believed that the division of power meant sedition, it would violate the absolute rights of the monarch. In his opinion the social contract exempted only a single person, or body, from the observance of the law: the sovereign.—Naturally, for practical purposes this led to the unlimited growth of the monarch's power and not of that of a democratic body.—On the other hand Rousseau considered the division of the supreme power the death of the body politic, the beginning of the withering away of the State. He says the sovereign power is simple and one, it cannot be divided

[15] J.-J. Rousseau, *Op. cit.* Vol. II, p. 32. — ". . . n'est qu'un être collectif, ne peut être représenté que par lui-même; la pouvoir peut bien se transmettre, mais non pas la volonté."

[16] J.-J. Rousseau, *Op. cit.* Vol. II, p. 34.—"Car la volonté est générale, où elle ne l'est pas; elle est celle du corps du peuple, ou seulement d'une partie. Dans le premier cas, cette volonté déclarée est un acte de souveraineté et fait loi . . ."

without being annihilated.[17] At another place of *Du contrat social* Rousseau called the manifestation of sovereign, the legislature, the heart of the State, the cessation of which involved the withering away of the State as a whole.

According to Rousseau, popular sovereignty is the exercise of power not only in the name of the people, but also by it, or still better a declaration of will, i.e. the creation of general norms. Behind popular sovereignty there is the general will, *volonté générale*. The otherwise pessimistic Rousseau states of the general will that it is always rightful and tends always towards the public weal".[18] Accordingly, he concludes that the resolutions of the people are always correct, as the people cannot be corrupted—however, it can often be misled. For the proper manifestation of the will of the public it is essential that there should be no segregated groupings. This attitude opposed to the formation of parties is natural with him for the simple reason that he rejects all forms of mediatization, he does not even want to hear of mediatisation (to use a term of the science of modern constitutional law). He believes that representation is degeneration, and brings it into line with the keeping of mercenary troops.[19] Here we again encounter the prohibition of dividing the popular sovereignty. Group will is not the will of the public.[20] This is the reason why eventually Rousseau came to the conclusion that the representative system was inappropriate and that mediate democracy was inacceptable. It was not by mere chance that he recognised the institution of direct democracy on the Swiss pattern as the only real and correct

[17] J.-J. Rousseau, *Op. cit.* Vol. II, p. 129. —"... l'autorité souveraine est simple et une, et l'on ne peut la diviser sans la détruire."

[18] J.-J. Rousseau, *Op. cit.* Vol. II, p. 37.—"... la volonté générale est toujours droite et tend toujours à l'utilité publique."

[19] J.-J. Rousseau, *Op. cit.* Vol. II, p. 132.—"... ils ont ... des soldats pour asservier la patrie et des réprésentans pour la vendre."

[20] J.-J. Rousseau, *Op. cit.* Vol. II, p. 38.—"Si ... les citoyens n'avoient aucune communication entre'eux, du grand nombre de petites différences résulteroit toujours la volonté générale, et la déliberation seroit toujours bonne. Mais quand il se fait des brigues, des associations partielles aux dépens de la grande, la volonté de chacune de ses associations devient générale par rapport à ses membres, et particulière par rapport à l'État ... Il importe donc pour avoir bien l'énoncé de la volonté générale qu'il n'y ait pas de société partielle dans l'État et que chaque citoyen n'opine que d'après lui."

form of the enforcement of popular sovereignty.[21] In all other forms of legislation—the manifestation of sovereignty—Rousseau would discover potential distortion and therefore rejected them, while parallel with this, he considered the existence of several forms of government possible; viz. democracy (Chapter IV, Book Three), aristocracy (Chapter V, Book Three), and the monarchy (Chapter VI, Book Three), further, their mixed forms.

The substitution of legislation for the sovereign prepared the way for a queer metamorphosis.[22] However fantastically it may sound, the Rousseauian world of ideas was the first ideological support of parliamentarism in the later continental Europe. As a matter of fact, notwithstanding of its adoration of Rousseau, the French Revolution so to say did nothing else but revised its master. In his draft for a constitution Robespierre did not follow the paths of manifestation of the *volonté générale* as Rousseau had prescribed it. In the revolutionary constitutions there were but rudiments of the principle of direct democracy (the provisions of direct democracy taken up in the constitution of 1793 had never been enforced), and it was not democracy, but Bonapartism, then the Restoration, and later on again Bonapartism that made use of these fragments for their own ends, for their legitimation. The doctrines of direct democracy disappeared. What remained was the theory of the absolute priority of the legislative organ. For many decades, we may say for a century, in the parliamentary republics the theory of supremacy, or one may safely say omnipotence of the legislature, could hold its own. Moreover, the doctrine of the omnipotence of the legislature found its way to England, allegedly uncontaminated by Rousseau. Applauded by Englishmen learned in public law, De Lolme expressed this omnipotence in a caricatured form: "It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman."[22a]

[21] Cf. Otto Bihari, *A tanácsok bizottságai* (Committees of the councils), Budapest 1958, p. 13.

[22] On the revolutionizing effect of the Rousseauian *volonté générale* and its intrinsic contradictions see Karl Polak, *Zur Dialektik in der Staatslehre*, Berlin 1959, p. 51.

[22a] Cf. A. V. Dicey, *Study of the Law of the Constitution*, Macmillan and Co. Ltd., London 1964, p. 43.

The idea of popular sovereignty first struck root in America. Article II of the Declaration of Rights of Virginia pronounced that "all power is vested in and consequently derived from the people" (June 12, 1776). A fortnight later, on July 4, in the Declaration of Independence the idea of popular sovereignty was formulated as follows: ". . .WE, THEREFORE, the Representatives of the UNITED STATES OF AMERICA, in General Congress, assembled . . . in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare . . ."

The history of the evolution of the idea of sovereignty, in the first place of popular sovereignty, should now be traced to its next phase, viz. to the French Revolution. The leading orators of the National Assembly and the Convention launched their struggle with illusions, and were more familiar with theory than with practical experience in statecraft.

In January 1789 Abbé Sieyés published his pamphlet, famous in world history: *Qu'est-ce que le Tiers État?* The pamphlet was merely a reply to the 27th December, 1788, resolution of the royal council, containing a statement that was already a concession and according to which "the unanimous will of the *Tiers État*, when it is in harmony with the general principles of equity, will in all times be called the will of the nation".[23] The *Tiers État*, third estate, which in point of fact comprised several strata of society, such as the bourgeoisie, the lower classes of the urban population (small artisans, small traders, journeymen, workers) and the peasantry, felt that it was the backbone of the nation and yet it was barred from the participation in the political power. "The third estate", said Abbé Sieyés, "is the complete nation".[24] In his pamphlet Sieyés with moderation, yet resolutely, formulates his position as follows: ". . .What is the third estate? All . . . What was it so far in the political order? Nothing . . . What does it want to become? Something." Naturally behind this something there lay hidden the claim to actual power.

On the 17th June the third estate declared itself to be the National Assembly, i.e. essentially it siezed the monopoly of legislation. Ostensibly, for practical purposes, the principle of popular sovereignty was

[23] Cf. Albert Soboul, *Précis d'histoire de la révolution Française*. Éditions Sociales, Paris (no year of publication).

[24] Cf. *Proklamationen der Freiheit*, Frankfurt–Hamburg 1959, p. 69.

victorious. However, in reality, this was out of the question. The *Tiers État*, and so the National Assembly, was not the representation of the whole people. It was a bourgeois factor made up of merchants, bankers, artisans, wealthy landowners and many lawyers (about one half of the 600 members of the third estate), which was a natural consequence of the indirect way of voting and the property qualification. Only persons who had completed their 25th year of age and whose name had been entered on the records of taxpayers could attend the electoral gatherings. From the above date onwards, for many decades, the people could not, and did not, take part in the exercise of popular sovereignty. The want or the possession of franchise in the course of the Revolution split up the population into two groups, viz. the groups of the passive and the active citizens. Only the Jacobins of 1792–1793 attempted a change in this state of affairs. After the fall of Jacobin dictatorship franchise was again restricted and made the enforcement of popular sovereignty problematic.

The formulation of the principle of popular sovereignty in the constitutions of the French bourgeois revolution and in other constitutional provisions is also of great interest. Article 3 of the 20th August 1789 Declaration of the Right of Man and Citizen pronounces: "As for the idea and essence all sovereignty derives from the nation; no body corporate, no individual person can exercise power which does not expressly issue from the nation." And Article 6 declares: "The law is the expression of the will of the public. It is the right of every citizen to take part in legislation in person or through his representative." The wording of the Declaration is almost wholly Rousseauian. It departs from Rousseau only in so far as it accepts not only the indirect, but also the mediate, representative democracy as the expression of the *volonté générale*. The Constitution of 1793 is by far more accurate and consistent than all its predecessors. In its Article 4 the Constitution declares that: "The law is the free and solemn expression of the will of the public . . . it cannot decree but what is just and useful for society . . ." The words of Rousseau emanate from Articles 25 and 26: "Sovereignty is concentrated in the people; it is one and indivisible, imprescriptible . . . Not even a single part of the people can exercise the power of the people as a whole, although each section of the sovereign in assembly has to dispose of the right to express its will in perfect freedom."

The French constitutions following upon that of 1793 were gradually becoming more and more cautious and complicated. In the Constitution of Year III (1795) Articles 6 and 17 of the declaration of rights touch this question. As a matter of fact Article 6 is wholly opposed to the position taken earlier in the matter of the general will. It regards the *volonté générale* as the will of the people and not as that of some sort of a body corporate. "The law is the public will expressed by the majority or the representatives of the citizens." This rise of the value of the law (as a matter of fact the law is declared to be the will of the public itself, and not merely the expression of the public will) in fact reduces the content of popular sovereignty. In the capitalist State the exercise of power in the name of the people part with the power created by the people, and in reality popular sovereignty is restricted to the former.

At this point the declaration of the idea of popular sovereignty in the French constitution breaks off for more than a half century. The Constitution of 1848 with almost official prosaism repeats Article 17 of the Constitution of Year III.

The antagonism of the bourgeoisie to the idea of popular sovereignty was even more accentuated in the countries where seigniorial power, the remnants of feudalism, brought about a compromise with the weak bourgeoisie. This was particularly characteristic of Germany, where at the time of the monarchy the problem of sovereignty—more particularly that of popular sovereignty—could not even be raised in a constitutional form. In imperial Germany the lawyers generally avoided the mention of sovereignty, by speaking of state sovereignty, by which they understood the same as what was expounded by Locke or Montesquieu. Only that the obvious duality of state sovereignty cast a veil on the underlying explanation of its content "monarch + people = organism of the State". There is no doubt that in the circumstances of monarchical Germany this solution in reality could only mean the sovereignty of the monarch. The school of Laband denies the potential existence of popular sovereignty.[25] On the other hand Jellinek on about the same ground denies the significance of the notion of sovereignty at all.[26] The 11th August, 1919 Weimar

[25] Cf. Paul Laband, *Das Staatsrecht des Deutschen Reiches.* Tübingen 1876, Vol. I, p. 86.

[26] Cf. Georg Jellinek, *Allgemeine Staatslehre,* Berlin 1900, p. 442.

Constitution for the first time in Germany contains the simple statement that state power proceeds from the people. According to the 30th November, 1920 Prussian constitution "the entirety of the people is the carrier of the state power" (Article 2).

The earlier doctrinaire position taken by the German liberal bourgeoisie, characteristic of the period between 1815 and 1848, according to which the constitution was sovereign, was even more complicated and obscure. Allegedly, this formulation had as its objective the greater emphasis on the significance of constitutional charter and the reinforcement of the authority of private property. Still even the Fascist Carl Schmitt clearly pointed out that "by this way the political problem proper, whether the monarch or the people is sovereign, has been by-passed . . ."[27]

Later on the problem lost much of its significance because the bourgeoisie, where it did not create a fascist dictatorship, incorporated the finest phrases of popular sovereignty in its constitutional charters without agreeing to any true concession in the power relations within the State. (This was particularly characteristic of the period following upon the Second World War, when the masses brought a pressure to bear on the bourgeoisie in order to have many of the principles of a democratic governmental organization incorporated in the new constitutions.) Moreover the liberal bourgeoisie when not from the rostra of the legislative bodies, so in pamphlets, and even in scientific writings called attention to the risks implied in the principle of popular sovereignty. Joseph Barthélemy writes in his famous French textbook: ". . .The theory of national sovereignty is dangerous for freedom . . . We have to reject the theory of national sovereignty, for it involves the idea of the infallibility and omnipotence of the people. In reality at the moment when the will of the people is legitimate merely because it is its will, legally the people may do anything; in such circumstances it is not necessary for its validity that it should be correct: it *is* correct because it exists (viz. the will of the people). Such a confirmation cannot satisfy the conscience of the modern student of law."[28]

[27] Carl Schmitt, *Verfassungslehre*, München–Leipzig 1928, p. 8.

[28] Joseph Barthélemy and Paul Duez, *Traité de droit constitutionnel*, Paris 1933, p. 76.

The principle of sovereignty, or more precisely of popular sovereignty, emerges as a fundamental problem in the formation of the governmental organization. As a matter of fact anybody consistently recognising this latter principle must inevitably come to the point where he accepts the validity of a direct or indirect guiding activity of the people, the overwhelming majority of the population, i.e. the working classes and strata in the State and Society.

3. DIFFERENTIATION OF THE GOVERNMENTAL FUNCTIONS IN THE EARLIER BOURGEOIS LITERATURE. DIVISION OF THE BRANCHES OF STATE POWER AND THEIR BALANCE

While feudal disunity was predominant in Mediaeval Europe, and even after it was superseded by the system of monarchical absolutism, the problem of a division of the political organization did not emerge at all. In the first instance such a division of power was meaningless because of territorial limitations and the grades of feudal hierarchy. On the other hand in the absolute monarchy all lines of demarcation were blurred by an extremely high degree of centralization, and the farming out of such important functions as the collection of revenues (*fermiers généraux* in France) made a further subdivision of the, in fact, centrally organized state machinery superfluous. It was the absolute monarchy that developed a tendency to make the organization of the centralized state power enormous;[29] the existence of this centralization was ensured by the fact that all links of the organization converged in the hands of the monarch. Consequently its operation depended on the monarch, or on his councillors at any time. A firm division of this organization, or a differentiation of permanent character of its functions, was almost unknown.

Such a division of powers, or differentiation of functions, ensued only when the bourgeoisie—simultaneously with its claim to a division of sovereignty, i.e. for the first time during the period immediately following upon the Glorious Revolution—wanted to get hold of part of the governmental mechanism, i.e. a large portion of the central agencies, and the local self-government, so to create

[29] Cf. Karl Marx, *The Civil War in France*, London 1933, Martin Lawrence Ltd., p. 37.

a basis for itself for the conquest of the state power as a whole. All that bourgeois jurisprudence writes of the differentiation in governmental functions in the preceding ages is arbitrary interpretation, since no organic relationship between the relevant theories that in fact had existed earlier and the doctrines so valuable for the bourgeoisie can be demonstrated.

Many a bourgeois scholar of public law makes mention of a rather ingenious part of Aristotle's Politics among the earlier theories. In fact he speaks of the organization of power and the division of governmental activities. When, however, this passage of Aristotle's work is compared with those of early bourgeois authors (Locke, Montesquieu, etc.) it would be hard to discover common traits at all, except perhaps the idea that the mutual relationship between a branch of power and another is characteristic of the given governmental and social system. Aristotle writes: "... All forms of constitution then have three factors in reference to which the good lawgiver has to consider what is expedient for each constitution; and if these factors are well-ordered the constitution must of necessity be well-ordered, and the superiority of one constitution over an other necessarily consists in the superiority of each of these factors. Of these three factors one is, what is to be the body that deliberates about the common interests, second the one connected with the magistracies, that is, what there are to be and what matters they are to control, and what is to be the method of their election, and a third is, what is to be the judiciary. The deliberative factor is sovereign about war and peace and the formation and dissolution of alliances, and about laws, and about sentences of death and exile and confiscation of property and about the audits of magistrates."[30]

Still Aristotle does not believe that a separation of these factors is necessary, in fact, in his opinion it is easily imaginable that the consulting body and the body administering justice equally consist of the entirety of citizens, whereas appointments to executive offices should be effected by lot from among all citizens.

What Aristotle wrote of the differentiation in various functions was highly ingenious. Still it was the contemporary reality of the

[30] Aristotle, *Politics*, Book IV, 1927 and 1928, Heinemann–Harvard University Press, London–Cambridge, Mass. 1959, pp. 345–7.

State build-up, or Society, which had an effect on early English and French bourgeois literature, and not this Aristotelian experiment. The doctrine of Locke, or Montesquieu, was launched with the definite end to buttress up the idea of sovereignty as demanded by the age (a certain state of equilibrium between the king and the bourgeoisie, or the feudal class and bourgeoisie) by creating a corresponding governmental mechanism and by assigning parts of it to the particular classes of society.

It was quite natural that the problem of the factors of power was not raised during the absolute monarchy, nor in the works of such philosophers of absolutism as Hobbes. However, no sooner the real struggle for a condition of equilibrium (i.e. the constitutional monarchy) began, for the time being, than simultaneously with the problem of sovereignty also the division of the exercise of the sovereignty appeared as a claim. John Pym in his indictment against the Earl of Stafford as a guarantee of the middle course between tyranny and unlawfulness mentioned the balance between the rights of the parliament (in his words, of the people), and the royal prerogative i.e. the observance of the law. This already foreshadowed a division of powers.

During the Protectorate of Cromwell the same idea was reflected in the *Instrument of Government* of 1653: "Bills passed by Parliament were to be presented to him, twenty days being allowed him to formulate any objections he might entertain. If within this period he failed to satisfy Parliament that his objections were well-founded, the Bills would become law in the teeth of his opposition, unless they contained anything contrary to the Instrument."

In *Two Treatises of Civil Government* John Locke discusses the legislative, executive and federative powers of the State.[32] Originally Locke spoke of these three powers, viz. the legislative "which has a right *to direct* how the *Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it", the exe-

[31] S. R. Gardiner, *History of the Commonwealth and Protectorate*, 1649–1656, Vol. II, Longmans, Green and Co., New York and Bombay 1903, p. 332

[32] J. Locke, *Two Treatises of Civil Government*, Cambridge University Press 1960, The Second Treatise, Chap. XII, 143, pp. 382 and 383.

cutive, "*a Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force", and the federative, which deals with the questions of war and peace, alliances and international agreements. Locke emphasises the separability of the latter two powers, however, he does not forget that—in the interest of uniformity in the enforcement—the internal execution, and, with a modern term, foreign policy are usually entrusted to a single hand, or a single agency. To this we have to add that, as was usual in his age, by executive power Locke understood the penal and direct law enforcement authority.

However, there is nothing to imply that Locke wanted to entrust the parts of the divided organism to different agencies, in particular to equate the legislative power and Parliament, to confer the executive (and federative) power exclusively on the king.

The point of Locke's theory was directed against the absolute monarchy: "For no Man, or Society of Men, having a Power to deliver up their *Preservation*, ... to the Absolute Will and arbitrary Dominion of another; whenever any one shall go about to bring them into such a Slavish Condition, they will always have a right to preserve what they have not a Power to part with . . ."[33]

The doctrine of the separation of the branches of sovereignty, or more accurately the separation of powers (*séparation des pouvoirs*), which is the only doctrine of separation generally current in bourgeois countries, and which is, at the same time, distorted with many an arbitrary interpretation, may be traced back to Montesquieu. However, the commentators of Montesquieu almost without exception contend that the statements made in Chapter 6, Book XI of *De l'esprit des lois* on the constitution of England are based on misunderstanding or are conscious forgeries: the conditions in England in the mid-18th century did not conform to what Montesquieu wrote of them.

Montesquieu's theoretical starting point appreciably differs from that of Locke in that the former pre-supposed an insatiable desire of power in mankind and spoke as a constant experience of the inclination of all men to abuse the power they possess until they stumble

[33] J. Locke, *Op. cit.*, Chap. XIII, 1949, p. 385.

upon barriers.[34] Hence according to Montesquieu the barriers have to be set up. A study of these barriers will convince us that the end was a limitation of absolutism and the initiation of the bourgeoisie into power. Here the reader will encounter no abstract principles, but political ends, in the same way as with Locke. Still for Montesquieu Locke's solution of the problem (the dual control of legislation in the hands of the parliament and the king, i.e. the King in Parliament) was by no means reassuring. Mainly he disapproved of the king's interference in legislation and execution. While for Locke the division of power, and within it the separation of the particular functions, was good enough to demonstrate the constitutional limitation of the royal power within the particular branches, Montesquieu with far greater caution wanted to deploy a host of guarantees in order that royal power might be limited within all state powers.

In the Chapter quoted above, Montesquieu in the first place generalized his statements on the forms of the branches of state power (later on he was audacious enough to study the States of Antiquity as well as those of the Middle Ages on the assumption as if the distinction of three branches of the state power had at all times been self-evident).[35] When now a comparison is made between the enumeration of Montesquieu and that of Locke a certain agreement will be obvious between the executive powers of the former and the executive and federative powers referred to by the latter. However, a little after the passage referred to above, Montesquieu declared of the second executive power that in fact it was the judicial power.[36] In this respect

[34] Montesquieu, *Oeuvres*, Librairie de L. Hachette et Cie. 1865. De l'esprit des lois, Vol. XI, Chap. IV, p. 253.—". . . que tout homme qui a du pouvoir est porté à en abuser; il va jusqu'à ce qu'il trouve de limites."

[35] Montesquieu, *Op. cit.*, Vol. XI, Chap. VI, p. 254.—"Il y a dans chaque État trois sortes de pouvoirs: la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil."

[36] Montesquieu, *Op. cit.*, Vol. XI, Chap. VI, p. 254.—"Par la première, le prince ou le magistrat fait des lois pour un temps ou pour toujours, et corrige ou abroge celles qui sont faites. Par le seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions. Par la troisième, il punit les crimes ou juge les différends des particuliers. On appellera cette dernière la puissance de juger; et l'autre, simplement la puissance exécutrice de l'État."

Montesquieu already departs from Locke. In point of fact Locke did make no express mention of the judicial power, on the other hand his outline of the functions of the executive power little resembled what bourgeois public law was to call by this name.[37] How did Montesquieu substantiate the need for a differentiation in the branches of state power? By the fact that after this definition they had to be separated consciously in order that freedom might be preserved. Montesquieu wanted to discover the condition for the existence of absolutism, or the despotic State in the concentration of power in one and the same hand. He was unable to reveal the deeper-lying social causes. However, he had a keen eye to see that the age of social equilibrium could be made use of for the inclusion in power of the strata so far thrust out of it.[38]

The cited passage clearly demonstrate that according to Montesquieu each of the three branches of power has to be kept apart from the others, and each has to be subordinated to separate control. In his opinion the survival or birth of tyranny cannot be prevented unless

[37] It should be noted that Montesquieu was striving after originality at any price. This is confirmed by the motto he had chosen for his work, namely Ovid's "prolem sine matrem creatam". Another characteristic feature was that although he was well acquinted with Aristotle's *Politica*, and frequently referred to it, still he pretended as if this idea had not occurred in Aristotle. In Book XI, Chapter IX, the title of which is *Aristotle's Way of Thinking*, Montesquieu wrote as follows: "Les anciens, qui ne connoissoient pas la distribution de trois pouvoirs dans le gouvernement, ne pouvoient se faire une idée juste de la monarchie". *Op. cit.*, p. 264. – Among these 'ancients' he lists also Aristotle, whose triple division was famous also in his age.

[38] Montesquieu, *Op. cit.* Vol. XI, Chap. VI, p. 254: – "Lorsque dans la même personne ou dans le même corps de magistrature la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté, parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement. . . . Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroient arbitraire; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrie, le juge pourroit avoir la force d'un oppresseur.

Tout seroit perdu si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs; celui de faire les lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers."

such organizational guarantees are introduced. However, in the background of the suggested organizational measures the claim to momentous social changes may also be discovered. As a matter of fact if Montesquieu had not gone beyond striving for these organizational modifications, he would not have had any significance in paving the road for the bourgeois revolution. It was exactly here that Montesquieu had surpassed Locke, who was thinking in parliamentary notions, at least he did not want to go beyond parliamentary solutions already, so to say, delimited in the Bill of Rights of 1689. The public opinion of the age of Montesquieu was more strongly influenced by the claim to a share in power to be alloted to the bourgeoisie than that of the England of Locke. This is reflected by Montesquieu's lines which today are only rarely quoted by bourgeois scholars of public law, not as if the passage contained anything which would sound as revolutionary claims in the present age, but mainly because it clearly brings to light the politician in Montesquieu and the social commitment of his doctrine.

From what Montesquieu set forth in a subsequent passage[39] it is clear that he was an opponent of all forms of direct democracy. Although he recognized the principle of popular sovereignty without pronouncing this term, still this he did only insofar as he derived all power from the people—at least as far as legislation was concerned. In his opinion the people was (for a number of aristocratic reasons) under-age and immature for serious political decisions and he would tie down the hands of a popular representative system in two respects: firstly, by the bicameral legislature and, secondly, by the veto of the

[39] Montesquieu, *Op. cit.*, Vol. XI, Chap. VI, p. 256.—"Comme dans un État libre tout homme qui est censé avoir une âme libre doit être gouverné par lui-même, il faudroit que le peuple en corps eût la puissance législative; mais comme cela est impossible dans les grands États, et est sujet à beaucoup d'inconvénients dans les petits, il faut que le peuple fasse par ses représentans tout ce qu'il ne peut faire par lui-même. . . . Il ne faut donc pas que les membres du corps législatif soient tirés en général du corps de la nation; mais il convient que, dans chaque lieu principal, les habitants se choisissent un représentant. Le grand avantage des représentans, c'est qu'ils sont capables de discuter les affaires. Le peuple n'y est point du tout propre; ce qui forme un des grands inconvénients de la démocratie."

executive power. In addition to these two, a third barrier would be the introduction of the property qualification for voting.[40]

Clearly what Montesquieu wants is a legislature of two chambers where the one chamber would be that of the notables, and where the rights of the second chamber would essentially be the same as those of the popular representation, except for a limitation mentioned later on in respect of the assessment of taxes, where owing to their financial interest—according to Montesquieu—the members of the second chamber would merely have the right of preventing the resolutions of the other house from coming into effect, without, however, being allowed to pass resolutions of their own in matters of taxation. Montesquieu further believed that the membership of the second chamber should be hereditary.

As regards the veto he set forth an idea so welcome and useful for the bourgeoisie of a later period: the danger of parliamentary absolutism.[41] In principle Montesquieu accepted the unrestricted character of the rights of the legislature, however, in practice he wanted to apply a counterweight in the form of the veto, so that any parliamentary resolution could be prevented from coming into effect. (Here the veto resembled somewhat the royal prerogatives of the kings of England.)

A restriction by far in excess of these in the Montesquieuian principle of popular sovereignty lay in the insistence on a property qualification for voting. What was even more, this restriction was expressed in a form which provided for any later reactionary system a theoret-

[40] Montesquieu, *Op. cit.* Vol. XI, Chap. VI, p. 257.—"Il y a ... dans un État des gens distingués par la naissance, les richesses ou les honneurs; mais s'ils étoient confondus parmi le peuple, et s'ils n'y avoient qu'une voix comme les autres, la liberté commune seroient leur esclavage, et ils n'auroient aucun intérêt à la défendre, parce que la plupart des résolutions seroient contre eux. Le part qu'ils ont à la législation doit donc être proportionnée aux autres avantages qu'ils ont dans l'État: ce qui arrivera s'ils forment un corps qui ait droit d'arrêter les entreprises du peuple, comme le peuple a droit d'arrêter les leurs. Ainsi la puissance législative sera confiée, et au corps des nobles, et au corps qui sera choisi pour représenter le peuple, qui auront chacun leurs assemblées et leurs délibérations à part, et des vues et des intérêts séparés."

[41] Montesquieu, *Op. cit.* Vol. XI, Chap. VI, p. 259.—"Si la puissance exécutrice n'a pas le droit d'arrêter les entreprises du corps législatif, celui-ci sera despotique; car, comme il pourra se donner tout le pouvoir qu'il peut imaginer, il anéantira toutes les autres puissances."

ical basis for the establishment of property and educational limits of optional rigour.[42]

So much of the position taken by Montesquieu in matters concerning the legislature. In the following we shall have to analyse the other two powers, in the first place the executive power, this being of greatest interest for the purposes of our study. On speaking of the executive power Montesquieu goes into the minutest details. He preferred to have the executive power deposited in the hands of a monarch.[43] At another place he also declared that a veto in the reversed sense was impossible, as execution had its natural limitations. The legislature could check the enforcement of the laws to see its correctness, with the proviso, however, that the monarch, i.e. the head of State could not be criticized (in the eye of Montesquieu the monarch was still sacrosanct); the councillors, ministers, etc. were responsible for the operation of the executive power as a whole and could even be punished. The legislature could exercise a further influence on the executive power by voting the tax annually.

According to Montesquieu, the principal scope where a solution of the problems of the division and balance of power has to be sought for are legislation and execution (he practically ignores the justiciary, and would convert it into an elected body merely to put an end to the fear of men of the law). He then speaks of the two parts of the legislative body both being tied by the executive power which in turn is controlled by the legislative power.[44] This is how, alongside of the division of power, the principle of the separation of the various branches of power (their assignment to different bodies and their

[42] Montesquieu, *Op. cit.* Vol. XI, Chap. VI, p. 252.—"Tous les citoyens, dans les divers districts, doivent avoir droit de donner leur voix pour choisir le représentant, excepté ceux qui sont dans un tel état de bassesse qu'ils sont réputés n'avoir point de volonté propre."

[43] Montesquieu, *Op. cit.* Vol. XI, Chap. VI, p. 258.—"La puissance exécutrice doit être entre les mains d'un monarque, parce que cette partie du gouvernement, qui a presque toujours besoin d'une action momentanée, est mieux administrée par un que par plusieurs; au lieu que ce qui dépend de la puissance législative est souvent mieux ordonné par plusieurs que par un seul."

[44] Montesquieu, *Op. cit.* Vol. XI, Chap. VI, p. 261.—"Le corps législatif y étant composé de deux parties, l'une enchaînera l'autre par sa faculté mutuelle d'empêcher. Toutes les deux seront liées par la puissance exécutrice, qui le sera elle-même par la législative . . ."

control by different strata of the society) has come into existence. The next of his recognitions is the need for the branches working in concert with one another as the fundamental principle of construction of the State organism, demanded by the new society.[45]

The theory of Montesquieu had an overwhelming influence mainly because it opened a path to the progressive forces of the age to achieve their goal. This theory should be valued no more and no less. Later the bourgeois State produced ever new and new forms of the division of powers, according to its needs at any time. No continuity other than the dependence of the governmental organization on the social needs of the ruling class can be discovered in this sphere of problems. Therefore Marx could write that the division of power was but the common industrial division of labour as applied to the State for the sake of simplicity and control. As all other sacred, eternal and unchangeable principles, this too was applied only insofar as it suited the given circumstances.[46] At another place he writes: "In an age . . . and in a country where royal power, aristocracy and bourgeoisie are in rivalry for domination, i.e. where domination is divided, the doctrine of a division of power will emerge as a ruling idea, which is then declared to be the eternal law."[47] The theory of the division of power in Montesquieu's formulation is not a sacred or unchangeable principle. Later on we shall try to demonstrate to what extent theory and practice of the principle has changed in the hands of the bourgeoisie, notwithstanding all reference to the original.

When contemporaneous social and political exigencies eventually turned Montesquieu's theory of a division of power to what it became (after these exigencies had exercised a direct influence on his opinions of sovereignty), the same can be said of Rousseau who lived almost a generation later (he was born twenty-three years after Montesquieu and survived him by as many years. Still *Du contrat social* was published by scarcely four years after *De l'esprit des lois*). Nevertheless, as has already been pointed out at another place, the president of the

[45] Montesquieu, *Op. cit.*, Vol. XI, Chap. VI, p. 261.—"Ces trois puissances devroient former un repos ou une inaction. Mais, comme par le mouvement nécessaire des choses elles sont contraintes d'aller, elles seront forcées d'aller de concert."

[46] Marx–Engels, *Gesamtausgabe*, Part I, Chap. 7, p. 117.

[47] Marx–Engels, *German Ideology*, International Publishers, New York 1947, p. 39.

Parliament of Bordeaux, the wealthy aristocrat, was separated not only by the years from Rousseau, the Genevan citizen. Montesquieu was made a partisan of the constitutional monarchy by his descent, class background, the age he lived in. Similar elements turned Rousseau into a republican, into a partisan of the direct democracy, and—even though unsaid—into the champion of popular sovereignty. Not even his sincere admiration of Montesquieu prevented him from drawing all conclusions from these elements.

As has been outlined in this study earlier, all subsequent solutions of the problems follow from the fundamental position taken by him in his doctrine of popular sovereignty. Once having accepted the doctrine of undivided and indivisible sovereignty, his adopting also the organizational consequences of the doctrine was only a logical necessity.[48] Rousseau makes it clear that, owing to the unity of sovereignty, the state power too, cannot be other than unified either. However, it may have manifestations. The agency created for the purpose may, in a manner subordinated to state power, i.e. to the supreme agency expressing this power, perform a definite function—without becoming a separate power.

Rousseau considered the people the sole expression of the supreme power without, however, offering a more explicit explanation of this notion. Moreover, he believed in the direct democratic manifestation of the supreme power, although in his work on the Polish government he accepted the Diet too as sovereign. All he insisted on was that the state organization should not operate without a legislative body, which should meet at frequent intervals, and the mandate of the members of which should be renewed often.[49] Even Rousseau distin-

[48] J.-J. Rousseau, *Oeuvres Complètes*, Vol. II, Deux-Ponts, 1792, pp. 34–5.— "Par la même raison que la souveraineté est inaliénable, elle est indivisible. Car la volonté est générale, ou elle ne l'est pas; elle est celle du corps du peuple, ou seulement d'une partie ... Mais nos Politiques ne pouvant diviser la souveraineté dans son principe, la divisent dans son objet; ils la divisent en force et en volonté, en puissance législative et en puissance exécutive, en droits d'impôts, de justice, et de guerre, en administration intérieure et en pouvoir de traiter avec l'étranger: tantôt, ils confondent toutes ces parties et tantôt ils les séparent; ils font du Souverain un être fantastique et formé de pièces rapportées; c'est comme s'ils composoient l'homme de plusieurs corps dont l'un auroit des yeus, l'autre des bras, l'autre des pieds, et rien de plus."

[49] J.-J. Rousseau, *Op. cit.*, Vol. II, p. 240.

guished agencies of different types, which were subordinate to this legislative body. So in the first place he spoke of the governmental agencies, i.e. the executive power (here he was not consistent, as he himself used the term power, however, in the above sense).[50] Much as he refused to recognize the representation of the legislative power of the people, at least in his *Du contrat social*, he was an advocate of the representative system in the field of the executive power, inasmuch as it represented the supreme power, i.e. the people and legislative assembly. Consequently the function of the executive agencies was in his opinion justified only when the legislative body did not operate or sit.[51] In this manner he puts up barriers to the executive power. There are no traces whatever of the Montesquieuian concert or separation. It should be noted that of the judicial power Rousseau speaks at the end of his work (Book IV, Chapter VII), in connexion with the censor's office. He attributed no particular significance to this question.

The Rousseauian theory too fails to offer an elaborate explanation how to separate the legislative function from the jurisdiction of the executive agencies by its subject-matter. About the subject-matter of legislation he said that this had always been a general one.[52] Hence the legislator was authorized to create Acts of a general nature. Rousseau considered the government a body interposed between the subjects and the supreme power. However, in this respect he said no more than the government did not bring about the general, but just in the enforcement of the general settled the particular cases —or matters—for the particular citizens.

[50] J.-J. Rousseau, *Op. cit.*, Vol. II, p. 137.—"Le pouvoir législatif une fois bien établi, il s'agit d'établir de même le pouvoir exécutif; car ce dernier qui n'opère que par des actes particuliers, n'étant pas de l'essence de l'autre, en est naturellement séparé."

[51] J.-J. Rousseau, *Op. cit.*, Vol. II, p. 130.—"A l'instant que le peuple est légitimement assemblé en Corps Souverain, toute jurisdiction du Gouvernement cesse, la puissance exécutive est suspendue, et la personne du dernier Citoyen est aussi sacrée et inviolable que celle du premier Magistrat, parce qu'où se trouve le représenté, il n'y a plus de représentant."

[52] J.-J. Rousseau, *Op. cit.* Vol. II, p. 50.—"Quand je dis que l'objet des loix est toujours général, j'entends que la loi considère les sujets en corps et les actions comme abstraites."

4. CONSTRUCTION OF THE GOVERNMENTAL ORGANISM IN THE BOURGEOIS STATE

The true life of the theory of popular sovereignty and that of the separation of the branches of the state power began immediately in the first phase of the victory of the bourgeoisie. It was in the course of the North American War of Independence that both of these ideas appeared for the first time on the governmental plane.

It was almost miraculous the speed with which the theory of Montesquieu found its way to the North American colonies of England, especially when it is remembered how little his teachings influenced the metropolitan country. Blackstone's famous work *Commentaries on the Laws of England* was perhaps the only work in which the effect of Montesquieu's teachings on English public law may be discovered. It was published in 1765, i.e. ten years before the outbreak of the American War of Independence. At that age these few years were hardly sufficient for a work to break a way to the upper strata of society. And yet this brief period sufficed for Montesquieu to become an oracle in North America. Carl J. Friedrich attributes this effect to the circumstance that the original foundations of a triple division of powers had already existed in the state organism in the American colonies of England, i.e. the triad of the governor, the autonomous colonial legislation and a judiciary, independent to a high degree, made easier the spread of the theory. When after the Declaration of Independence the preponderance and leading role of the legislature became manifest, many feared the "tyrannical power of the majority".[53] The first part of this reasoning explains but little of the assumption. As a matter of fact the legislative, administrative and judicial organs co-existed in a number of states without eliciting such a vivid response to the Montesquieuian theory as in America. The profounder reason may be discovered in the fact that the social strata—who for their activities in connexion with the creation of a constitution were called the Fathers of Constitution—who had a leading role at a later stage in the American War of Independence, were in fact conservative revolutionaries. They wanted to moderate the activities of the masses,

[53] Carl J. Friedrich, *Der Verfassungsstaat der Neuzeit*, Berlin–Göttingen–Heidelberg 1953, p. 202.

hence even those of the representation.[54] They applied in the first place not to Rousseau proclaiming popular sovereignty, the legislative power of the people, but to the moderate Montesquieu and found his solution, which meant the cessation of English absolutism but not of necessity the activisation of the more radical masses, fully satisfactory. Burke's watchword "no taxation without representation" suited this society very much.—All this did not, and could not, produce any sort of a radical outlook in the leading strata of American society. As Madison wrote, "the oracle who is always consulted and cited on this subject, is the celebrated Montesquieu".[55] Yet not even Montesquieu was adopted by the American society with his doctrine uncontaminated. In its subsequent development the American society often referred to Montesquieu, still it departed from him in many a significant point.

The first significant Act dealing with these questions, the Virginia Bill, defining the rights of the citizens discussed the problem of both popular sovereignty and the separation of powers, in an interesting and characteristic manner. As regards popular sovereignty, the Bill declares "that all power is vested in, and consequently derived from the people . . ." (Sec. 2.)—The Bill did not recognize the institutions of direct democracy. On the other hand it strongly emphasized the preponderance of the legislature. ". . . that all power of suspending laws, or the executions of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." (Sec. 7.)—This is the point where we encounter "the tyranny of the majority", the risk mentioned by Friedrich. All these points received a more definite formulation than those on state power: ". . . that legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body

[54] Ernst Fraenkel, *Die repräsentative und die plebiscitäre Komponente im demokratischen Verfassungsstaat*, Tübingen 1958, pp. 18–9.

[55] A. Hamilton, J. Madison and J. Jay, *The Federalist or the New Constitution*, Oxford 1948, Basil Blackwell, p. 246.

from which they were originally taken, and the vacancies be supplied by frequent, certain and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct." (Sec. 5.)—This point speaks of a number of things, except the method of separating the branches of power. The Bills of 1776 contain no provisions to this effect, and it was the Declaration of Massachusetts that first referred to the problem: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to end it may be a government of laws, and not of men." (Sec. XXX.)—Here the Declaration is somewhat closer to Montesquieu, however, there is no reference as to the details of a solution, which makes the situation all the more intricate, since the theory grew up in a monarchical soil. So at the time of the creation of the republican form of government a number of difficulties cropped up.

On the other hand the Constitution of the United States of America (17th September, 1787) is clear-cut. It takes over with modifications, which are by no means insignificant, Montesquieu's doctrine. Without defining the principles of sovereignty, the Constitution divides the state power into three parts, and separates the legislative, executive and judicial powers. The influence of Montesquieu manifests itself in the bicameral legislature (although the second chamber is the embodiment of the federation as different from the original idea; Article I, Section 2), in the presidential vote (Article I, Section 7), the total rejection of parliamentary government (Article II, Section 2), the incompatibility of legislative and administrative activities. On the other hand there is a considerable difference between the original idea and the Constitution in the definition of the position of the judiciary. As has already been mentioned earlier Montesquieu considered the Judiciary a nothing, something void of authority. He did not even want to entrust important governmental functions other than the narrow scope of the application of the law to it. At the same time the Fathers of the Federalist made use exactly of this agency against the legislative power, against the force of representation. Hamilton called the judiciary the stronghold of justice and public

order.[56] Although the Constitution contains no express provisions defining the high degree of authority of the Judiciary, still it is clear from the statement of Hamilton that at the creation of the Constitution a wording was brought into existence which at a later time permitted the almost unlimited extension of the competence of the judiciary. Justice John Marshall in the famous case Marbury v. Madison, in 1803, i.e. sixteen years following upon the approval of the Constitution, declared constitutional judicature to be the obvious sense of the Constitution.

The American Constitution departs considerably from earlier theories also by the fact that it defines the competence of both the legislative organ and the President. The jurisdiction of Congress is defined in Article I, Section 8.[57] Some of the powers of the Senate are defined in Article II, Section 2, too. As regards the powers of the President, these have been defined in Article II, Section 2, in a not too detailed form. Here we shall dispense with an analysis of later development, or the gradual encroachment of the presidential and administrative power upon the other branches of the state power, this being a general trend in the evolution of all capitalist countries. Here we shall content ourselves with remarking that a distrust of the popular representative chamber existed from the very outset. This distrust manifested itself in the significance of presidential authority already at the initial stage, the bicameral system of the legislature, and then the supervision of the legislature by the judiciary, as a countersecurity. At a later stage of evolution in American political life all direct reference to the Montesquieian principle of division and balance of the branches of

[56] A. Hamilton, J. Madison and J. Jay, *Op. cit.*, pp. 246–8.

[57] Accordingly the competency of Congress extends (among others) to the following:"... To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence ... of the United States ... To borrow money on credit ... To regulate commerce with foreign Nations, and among the several States ... Naturalization ... and bancruptcies ... To coin Money ... To provide for the Punishment of counterfeiting the Securities and current Coin ... To establish Post Officers and Post Roads ... Patents and copyrights ... To constitute Tribunals inferior to the supreme Court ... Piracies and felonies ... To declare War ... make rules concerning Captures on Land and Water ... To raise and support Armies ... To provide for calling forth the Militia ... To provide for organizing, arming and disciplining the Militia ... To exercise exclusive Legislation ... over such District ... become the Seat of the Government ..."

the state power fell into desuetude. All that remained was a reference to the system of checks and balances.

Let us now see the appearance of the two sets of theories in their country of origin, where the details of the American practice did not interest the people, but the fact that a practice did exist gave an impetus to them. In France mainly the ideas of Rousseau spread among the masses. This was confirmed by the *cahiers de doléance* forthcoming from the lowest strata of the population. It is out of the question to speak of an equally extensive, so to say popular acquaintance with the theory of Montesquieu. On the other hand the two sets of theories existed peacefully in the outset, side by side in both legislative Acts and the several declarations. It was only after the conclusion of the first phase of the Revolution that the practical enforcement of the principle of popular sovereignty proved to be incompatible with a division of powers in the state mechanism.

In the Declaration of the Rights of Man and the Citizen (1789) the multifariousness of opinion could not yet be clarified. Consequently at one place the Declaration spoke of the unified and indivisible sovereignty of the nation (Sec. 3), at another it pronounced that a society in which the powers were not separated had no constitution (Sec. 16), i.e. a society or State of this type could not be considered constitutional. The lack of a definitive resolution stood out even more clearly in the 'alternative native clauses'[58] of Sec. 6 and Sec. 14, where the declaration called the law on the one hand an expression of the *volonté générale*, while on the other hand it declared the enactment of the law and the passage of the budget equally possible with either a direct or a representative method. Before long these problems were to give rise to heated debates in the *Assemblée nationale*, in particular about the contents of direct and indirect democracy, further, of representation. The subsequent, definitive constitutional settlement was prepared by the Franchise Act of December 22, 1789: "The representatives delegated by the *départements* to the *Assemblée nationale* cannot be considered representatives of a single *département*, but those of all départements, i.e. of the nations as a whole (Sec. 8

[58] Carl Loewenstein appropriately uses this expression in his work *Volk und Parlament nach der Staatstheorie der französischen Nationalversammlung 1789*, München 1922, p. 39.

of the Preamble) . . . The only title of the representatives of the nation to their functions is the act of election; since no special mandate can interfere with the freedom of voting, the *assemblées primaires* and the meetings of the electorate should address the petitions and instructions which they want to pass on to them directly to the legislative body." (Part I, Sec. 34.) Here petitions and instructions are mentioned, however, only as supplementary acts, which do not bind the representatives either individually or collectively. Still, the atmosphere of the claim to popular sovereignty surrounds these statutory provisions. On the other hand in conformity with the earlier system the classes of active and passive citizens remained. (The active citizens numbered about four million.) Hence at the first phase of the Revolution there could be talk of such a limited popular sovereignty only.

The second momentous legislative Act of the French Revolution was the Constitution of 1791 (September 3, 1791). This Constitution was rather succinct about the question of sovereignty. The more circumstantial it was on the principle of division of power. This was the true golden age of the theory. As a matter of fact 1791–1792 was the phase of transient balance. The final rupture between nation and king had not yet come. Title III, Sec. 2 of the Constitution expressly declared that the nation could exercise power only by way of delegation. In this fundamental Act the classical form of a division of power prevailed. In comparison with Montesquieu's idea there was but a single change, viz. the unicameral *Assemblée nationale*, the legislative organ. On the other hand the form of the royal assent was thrown into relief more clearly than in the original idea of a veto. Power was divided into three sections, viz. legislative, administrative, and judicial. The separation of these powers was clear, although at certain places they would be overlapping. For example, the legislative power was organized in a representative form, the legislature consisted of representatives. However, legislation was the right of the National Assembly and, in the form of the royal assent, that of the King (Title III, Sections 2 and 3; further, Parts from I to IV in Chapter III of the same Title). Under the constitution the government was monarchical, the executive power was delegated to the King and as a whole was exclusively in his competence. The King was made the supreme chief of general administration (Title III, Sec. 4 and Chapter IV, Sec. 1, then Parts from I to III). Of the judicial power the Constitution

declared (Title III, Chapter V, Sec. 1) that this could be exercised by neither the legislature nor the King. The judges had to be elected by the people for a definite term, whereas it was the King's prerogative to install them into their office, without, however, having the right of repudiating the election.

Royal assent was accompanied by a suspensive veto. In general royal approval was required for the prorogation of the sessions of the National Assembly. Promulgation of laws took place after the royal signature and the counter-signature of the minister of justice had been affixed, under the Seal of the State.

The 1791 Constitution differed from the European constitutions in that it defined the powers of the legislative assembly. In conformity with Title III, Chapter III, Part I, Sec. 1 these included: (i) initiation and enactment of laws, (ii) passage of the budget, (iii) establishment of the public taxes, (iv) assessment of the direct taxes by *départements*, (v) creation and abolition of public offices, (vi) determination of the currency, (vii) admission of foreign troops, or men-of-war, respectively to French territory and French naval ports, or the refusal of such requests, (viii) determining the establishment of the armed forces and the complement of the navy, their pay, and their administration, (ix) establishment of the methods of management and alienation of national landed property, (x) raising the question of ministerial responsibility and that of other high-ranking administrative officers in the supreme court, (xi) passage of Acts on distinctions and awards, (xii) perpetuation of the memory of the great men of the nation.

In addition, war could not be declared unless a proposal of the King had been approved by the National Assembly. Only the legislature could ratify peace treaties, treaties of alliance and commercial agreements.

The Constitution took a rather remarkable new position in the matter of a distribution of functions among the local government agencies. In the *départements* administrative functions were assigned to the chief administrators elected by the people and supervised by the King. However, Title III, Chapter IV, Part II, Sec. 3 declared that the chief administrators could not interfere in the exercise of the legislative power, or suspend the enforcement of the laws. Nor could they intertere with the administration of justice, and with the management of military affairs, i.e. in a wholly unusual manner the division

of powers extended here also to territorial jurisdictions, at least on the level of departments.

When in 1792 the institution of the monarchy was abolished in France, simultaneously the need for a division of powers and for any kind of a balance of powers ceased. From this date on three solutions suggested themselves (when the constitutional solutions of the State organism are examined from this aspect only, by disregarding all other aspects): (a) parliamentarism, full priority of the National Assembly, the legislative body; all other types of governmental agencies would in this case be subordinate to the National Assembly (the constitution would not even try to conceal this; in fact here the question is of a radical, democratic form of government, as e.g. in the case of the revolutionary settlement of 1793); (b) a liberal parliamentarism with an ostensible division of powers; here in reality there would be no balance of powers among the legislative, executive and judicial organizations, but the two chambers of the legislation would attempt to bring about some sort of a balance or compromise between the feudal large landowner class on the one, and the great and medium capitalist classes of the bourgeoisie on the other part (an example which may be quoted here was the Constitution of the 4th November, 1848); (c) the constitution openly declaring the one-man dictatorship which does not speak of the principle of a division of power but places the dictator in the centre of powers. In this case all governmental agencies operate in subordination to a single person (here examples are the Constitution of the Year VIII—the consular charter of the 13th December, 1799; the senatus-consult of the Year XII, the 18th May, 1804—on the institution of the Empire; the Constitution of the 14th January, 1852; and the senatus-consult of the 7th November, 1852—on the Emperor's title of Napoleon III.

Accordingly there was no true division of powers in the different French constitutions, nor in any other constitutional charter after the short transient period of an equilibrium. Admitting this, can we discover any new differentiation among the factors of the governmental organism at all? Evidently—owing in particular to the fact that since the end of the 19th century the governmental duties have become extremely complex—for the modern State a division of the governmental mechanism, equally complex and discharging—as it does various functions—would be extremely necessary. Hence in name the

three branches—legislative (parliamentary) and, within the executive, the administrative as well as the judicial (also called law-enforcing) branches—survive. In practice there is no true division of power of any kind behind these designations. In general one of the branches will grasp leadership. The bourgeois scholars of public law have refused to recognize this fact for a long time. Today, except for the most conservative representatives of the discipline of public law, they openly admit this preponderance of the one branch or the other. "... In the reality of the State at any time one of the carriers of the three powers will be strongest", writes Hans Peters, "no matter whether this strength is derived *de iure* from the constitution or *de facto* from a free play of the forces".[59] Obviously, in the 'free play of the forces' neither Peters, nor any other bourgeois scholar of public law would discover the will and the claims of the ruling bourgeois class, i.e., of the class which at the given phase of history ceases to be enthusiastic about parliamentarism and insists on a centralized organization, into the cards of which the mass of the all too superfluous representatives is not granted a look.

Here the trend of thought will be interrupted for the sake of clearing up a characteristic tendency in the whole process. Earlier some of the features of the French Constitution of 1793 have been mentioned. If for no other reason so merely because of our interest in the great deal of experiments launched by the radicalism of this Constitution let us now discuss it in a few details. — The Constitution of 1793 subordinated the governmental mechanism as a whole to the legislative assembly, i.e., the *Assemblée nationale*, of which it declared that it was "one, indivisible and permanent" (Sec. 39). The body called executive council became the executive organization. The members of this council were elected by the National Assembly from a panel of candidates proposed by the electors of the *départements*. The National Assembly made a distinction between laws and decrees in its Acts. —Enactment of a law was required for legislation in civil and criminal matters, the general administration of ordinary revenue and expenditure, the management of national property, the establishment

[59] Hans Peters, Der Kampf um den Verwaltungsstaat. Verfassung und Verwaltung in Theorie und Wirklichkeit. *Festschrift für Wilhelm Laforet*, München 1952, p. 22.

of the denominations, weights, minting, designation of coins, the assessment and collection of taxes, declaration of war, territorial division, and the tribute to the memory of great men.—Decrees were issued in matters of the equipment of the armed forces, admission of foreign troops to French territory and foreign ships to French ports, matters in reference to public safety, public health and public works, the issuing of money, extraordinary expenditure, special local measures affecting a given office, or community, or a definite type of public work, the defence of the country, ratification of agreements, appointment of the commanders-in-chief and their discharge, calling a definite category of civil servants to account, indictment of conspirators, partial modification of the territorial division, national fees (Sections 54 and 55).

After the rule of the Convention under the democratic Constitution of 1793, the fact that the division of powers was only formal in the Constitutions of the Years III and VIII undoubtedly prepared the way for sort of unipersonal dictatorship. And similarly, the Constitution of 1848 prepared the way for the Second Empire, and the second crushing of parliamentarism. Therefore Marx could write in his paper on the 18th of Brumaire of Louis Bonaparte about the circumstances of the birth of the Second Empire that " the victory of Bonaparte over the legislature was the victory of the executive power over the legislative power, the victory of violence without phrase over the power of phrase".[60]

Let us now dispense with a narrative of the history of the struggle between the legislature and the executive power. As a matter of fact this would be outside the scope of this book. The general trend is recognizable even so. The bourgeoisie itself speaks with ever greater frequency of the original theory of separation of the powers, of the balance of powers, as an antiquated, useless notion. However, rather characteristically, the reasoning of the bourgeois lawyers presents the problem as if other democratic ends were preventing the consistent realization of the *trias politica*. Fraenkel e.g. hides the departure from the Montesquieuian theory behind the theory of popular sovereignty, and backs it up with the need for parliamentarism. "The theory of

[60] Marx–Engels, *Selected Works*, Vol. II, International Publishers, New York 1933, p. 441.

popular sovereignty was incompatible with the idea as if the three powers meant each an independent moral person (Kant); however, the contradiction between the theories of popular sovereignty and of the separation of powers has been resolved as soon as by the recognition of the primacy of the legislative power the doctrine of a separation of powers was converted into a doctrine of the division of powers."[61] This statement consists of a correct and an incorrect part. It is true that the two theories are irreconcileable and that the earlier theory disappears to be superseded by a simple division of labour. On the other hand it merely is not true that all this reasoning has aimed at merely throwing open the gates to a prevalence of the doctrine of popular sovereignty, to the primacy of parliament, or the legislative power. Already in a few years after the outbreak of the Revolution the bourgeoisie took shelter under the dictatorial power. And this case was to be repeated several times during the following decades of its history. While this attitude of the bourgeoisie cannot be recognized as the general trend of the 19th century, still it was gathering strength during the years only to become definitive in the 20th century. The separation of the branches of state power has been superseded by a simple division of powers, or in the words of Loewenstein, the separation of powers has been replaced by co-ordinated powers.[62] The principle of popular sovereignty was thrust out eventually by that of the 'rationalization of power', in effect by the primacy of the executive or administrative agencies. The disappearance of the theory of the branches of state power, of the practice of these theories, virtually coincides with a renunciation of the principle of popular sovereignty. In a large number of bourgeois constitutions both theories still survive—here the constitutions of the fascist countries, Portugal and Spain, may be exceptions—but they have lost their original content a long time ago.

In the 20th century, the bourgeois theory of State openly 'squares accounts' with Montesquieu's doctrine. As an initial step bourgeois theory wants to reduce Montesquieu's theory to 'the functional differentiation among the governmental agencies', accepting it not

[61] Ernst Fraenkel, Gewaltenteilung, Fischer Lexikon. *Staat und Politik*. p. 100.

[62] Carl Loewenstein, *Verfassungsrecht und Verfassungspraxis der Vereinigten Staaten*, Berlin–Göttingen–Heidelberg 1959, pp. 14 and 15.

"in the sense of an impossible separation".[63] Therefore bourgeois theoreticians began to speak of the triple functions of the State. This division had nothing in common with the original theory. "What has remained of the doctrine of a separation of powers two centuries after the publication of *De l'esprit des lois?*" asks the Russian emigrant writer on public law, Mirkin–Guetzévitch. "What with Montesquieu was a simple constitutional argument directed against the *ancien régime* became a dogma with the theoreticians of the Revolution and the men of the constituent assembly. This obsolescent dogma which is in contrast to the reality of democratic parliamentarism, is unable to serve the political needs of modern Europe."[64] And to confirm his thesis he asserts that in modern life, under parliamentary government, the political primacy of the executive power is a matter of necessity. A large part of the West German writings on public law go even beyond this. So Peters states that during the latter hundred and fifty years the functions of the State have multipled to a high extent, and the growth of the number of these functions have provided the basis for the expansion of the competence of public administration, or at least promoted the birth of the new trend. In German bourgeois constitutional law all this has been given a new designation: *Verwaltungsstaat* (administrative State).[65] Peters describes this State by asserting that "its centre of gravity has passed over to the executive agencies quantitatively and qualitatively".[66]

Yet all this does not put a full stop to the story of the division of powers. Admittedly, public administration is preponderant in the

[63] Boris Mirkine–Guetzévitch, De la séparation des pouvoirs. In: *La pensée politique et constitutionelle de Montesquieu*, Institut de Droit Comparé de la Faculté de Droit de Paris, Paris 1952, p. 163.

[64] Boris Mirkine–Guetzévitch, *Op. cit.*, p. 181.

[65] Hans Peters, *Der Kampf um den Verwaltungsstaat*, München 1952, p. 133.

[66] Hans Peters, *Die Gewaltentrennung in moderner Sicht*, Köln–Opladen 1954, p. 7. — It should be noted here that before Hungary became a people's republic, i.e. before the liberation of the country, the need for a third, royal branch of power had emerged in the Hungarian literature on public law. Before the First World War Győző Concha was the advocate of this idea. Cf. *Az államhatalmak megoszlásának elvei* (Principles of the division of state powers), Budapest 1892, p. 42. — It is beyond doubt that the theory was making headway in Hungary merely because the king was in a particular position as the sovereign also of another State.

modern capitalist State still, there are other—parliamentary, judicial, social, etc.—agencies that have to be recognized in one form or another. These agencies have to be integrated into the structure of the State. Therefore, next to the vague theory of 'checks and balances' the theory of the 'Gewaltenpluralismus' (treated by Carl Schmitt) has turned up. Werner Weber mentions that parallel with the Constitution (which is the fundamental statute of the German Federal Republic), a specific system of a division of powers has come into being, namely the balance system of the pluralism of the oligarchic holders of power.[67] These organizations, or in the American parlance of the theory of State, pressure groups are the associations of the employers, economic associations, the Churches, communities of interests, the political parties, the trade unions. — The problem of pluralism made its appearance in the first third of the 20th century (Schmitt originally opposed it, still he directed attention to it as living reality), when the new situation created in the legislatures owing to the growing numbers of labour representation prompted the capitalists to show a growing distrust to these institutions of the State, and to insist on the preponderance of new agencies in lieu of them. Hippel, e.g., demanded special privileges and autonomy (extending even to legislation) within the capitalist State—in the cultural sphere for the Churches as well as for the various scientific and art institutions, while in the political sphere for the commercial chambers.[68]

The main question, an elaborate discussion of which would go beyond the scopes of our study, is the growing function of the political parties within pluralism. Today the term the State of parties (*Parteienstaat*) has received general acceptance. The term wants to convey the idea that in the modern capitalist State the most significant decisions are not made in the debates of the legislature, or at the cabinet meetings, or at mass meetings, but in the conventicles of the party leaders. Here agreements are reached which map out the activities of the legislature and the government beforehand. In one word the will of the nation is 'mediatized' by the political parties, i.e. the representation of the will of the population through the

[67] Werner Weber, *Die Teilung der Gewalten als Gegenwartsproblem. Festschrift für Carl Schmitt*, Berlin 1959, p. 265.

[68] Ernst v. Hippel, *Gewaltenteilung im modernen Staat*, Koblenz 1949, p. 41.

agency of the legislature also formally comes to an end and is superseded by the manifestation of the will of the parties' narrow leading cliques within the bourgeois parliament.[69]

And here again we have come to the principle of popular sovereignty. By the beginning of the 20th century merely the name had survived in the constitutions. In the 19th century the bourgeoisie emptied the idea of popular sovereignty of its contents by the introduction of the property qualification for the franchise. In the 20th century the principle proper was attacked, together with representative parliamentarism as an institution. Barthélemy in his work referred to earlier treated the theory of popular sovereignty by reasoning not only that it "was dangerous for freedom", but also that the theory itself was to no purpose and so unnecessary. And in fact this was the principal opinion of the bourgeoisie about popular sovereignty. Now, if this theory was to no purpose, what was the legitimizing force of parliamentarism? – It was quite natural that on this understanding Barthélemy thought that liberal democracy was the smallest evil.[70]

A characteristic trait in bourgeois constitutional law, in particular in the West-German and American jurisprudence, is exactly the fact that it emphasizes the need for a growing role of public administration. Carl J. Friedrich believes that bureaucracy is the core of the modern State. He represents the conflict between bureaucracy and democracy as a slogan and for that matter as a slogan which "jeopardizes the future of democracy".[71]

Hence the bourgeoisie of the 20th century has not only thrown the idea of popular sovereignty overboard, like the capitalist of the 19th century, but has definitively broken away from it even in the theoretical sense. In the bourgeois theory of State and discipline of constitutional law, new views—more thorough and definitive than any prior one—support this apostasy: the 'principle' of the administrative State, pluralism and that of the State of political parties. From the

[69] As for the role of the communist party in the socialist State – which has acquired a wholly different aspect—cf. 2 in Chapter III of this work.

[70] Joseph Barthélemy and Paul Duez, *Traité de droit constitutionnel*, Paris 1933, p. 78.

[71] Carl J. Friedrich, *Der Verfassungsstaat der Neuzeit*, Berlin–Göttingen–Heidelberg 1953, p. 64.

socialist point of view this is of importance because, while the earlier division of labour has been liquidated at the same time no new, firm division of labour has been created either in theory or in practice.

5. BOURGEOIS LOCAL ORGANS SELF-GOVERNMENTS

Originally the question of a division of power or the separation of the branches of state power affected only the uppermost, centrally located agencies.

However, already at the time of the absolute monarchy, parallel with the central agencies local agencies were also called to life which performed functions defying central management. Such local agencies were often under private control (e.g., the *ferme générale* in France, i.e., the collection of excises). The question of the position of local, i.e., non-central and non-national agencies emerged not only in France, but wherever the bourgeois revolution was victorious. An answer to the question has been sought, in forms varying by countries, up to the present day. At the beginning the straightforward pattern was the local agency of larger or smaller independence salvaged from the age of feudalism. The Middle Ages created two forms of local government: the manorial administration (which partly turned up as the management of the affairs of the own landed property and other manorial rights, partly appeared in the form of a joint administration of larger territorial units, like in Hungary the counties, by the 'self-governing bodies' of the nobility), and the civic administration of the towns. In general it was characteristic of the period preceding the bourgeois revolution that in the feudal state the bourgeois local governments had become the cradles of the revolutionary, progressive tendencies (e.g. the Geneva of Calvin, and the majority of the Southern German towns, etc.), where the subsequent *Tiers État* collected its first experiences in politics. After the revolutions in those countries where the revolutionary struggles failed to produce radical changes, where the bourgeoisie came to terms with the feudal nobility, like in England, or Hungary, the bases of resistance survived in the feudal local governments. Subsequently these were to change into such local agencies that for landowners turning into capitalists, were playing the part of opposition against the centralized national agen-

cies expressing the direct interests of the industrial bourgeoisie. (Here we shall not enlarge on the 'self-governing' forms of free peasant communities exceptionally surviving, such as the Swiss *Landsgemeinde* and *Dorfgemeinde* as well as the Danish *things*, etc.).

We are not primarily interested in the reactionary hangovers in the local government bodies, but rather in the fact the organization survived the centralizing tendencies of absolutism and became, e.g., in France, the manoeuvring ground of the preparations for war of the *Tiers État*. So our interest is now in the civic self-government and the organs supplementing it as the local administration of the bourgeois State. It is beyond doubt that the self-governments and also the de-concentrated agencies served to perform the tasks of the bourgeois State—almost from the beginning. (The de-concentrated agencies operated in the particular local territorial units, they were not brought to a common centre—that is why they are called so—albeit they were directly subordinated to the central organs and also created by these.) Both of these kinds of local organs perform administrative functions. This is so much so that bourgeois scholars of public law used to consider them to be the organic parts of the executive power, of the executive organism.—It is only the later bourgeois jurisprudence of the 20th century that have taken special notice of these agencies. —Since the earlier literature almost exclusively analyzed the self-governing sphere of activities of the local organs of state power, let us first cast a glance at this sphere.

The French jurists—who at the end of the 18th and at the beginning of the 19th centuries discussed the state organism and within it the self-governments as local administrative agencies most extensively—were relying on natural law both theoretically and also for practical purposes. This position manifested itself in the form of referring to 'the natural rights of the free commune'. The communes were regarded as something independent of the State, i.e., as organs which, like the family, preceded the State; the State was but the association of these communities. During the French Revolution Thouret, in a debate on the reorganization of communal administration, called the communes 'small municipal states'.[72]

[72] *Archives parlementaires*, 1789—1799, Vol. IX, Librairie Administrative de Paul Dupont, Paris 1875, p. 208.

The natural rights of the free commune failed to meet with undivided success already during the first phase of the French Revolution. For in the course of the Revolution the counter-revolutionary actions —in particular during the first years—started from the provinces (Vendée, Bretagne) and not from the centre. Therefore the autonomy of the former had to be curbed to a certain extent and a form of a dependence on the centre had to be shaped. Consequently the Law of the 14th December, 1789 established two competences for the communities or communal self-governments, viz. the one the community exercised on its own right as municipal power (which is a remnant of the natural law of free communities), and the other is delegated by the central agencies of the state administration and of the executive power.

Although the Jacobin Constitution did not speak of this topic in this form, still, it separately mentioned the administrative and municipal corporations, moreover, in Sec. 83 it authorized the legislative body to define the rules of subordination and functions of the municipal officers and administrators, and also the punishments these may inflict on the citizens, i.e. the Constitution established an essentially strong centralization for the self-government bodies and a delegated administrative executive power instead of the theory of free communities. The Constitution of the Year III went even further on the path of centralization. In Title VII, On Administrative and Municipal Corporations, there was no word said of local governments as separate bodies. Although Article 363 of the Constitution declared that "the citizens can exercise their political rights only in the primary and municipal meetings", the rights of these meetings were considerably narrowed down in Articles 26 and 27 and even typically local matters were not assigned to their competence. The municipal administrators mentioned as local agencies were. according to Article 193 subordinated to the administrators of the *départements*, and these in turn were subordinate to the ministers. The administrators were not responsible to the self-governing corporations. This was a significant step towards the suffocation of the local agencies still vigorously operating, often to the prejudice of the central power.[73]

[73] Cf. the remarks of Engels: Marx–Engels, *Selected Works*, Vol. II, International Publishers, New York 1933, p. 167.

In the following years the visible and invisible attempts at centralization grew ever stronger in the French constitutional charters and in the everyday administrative operations. It would not be worth while to trace all these attempts. The executive functions were thrust into prominence in the activities of the local government bodies. The first draft of 1789 mentioned the departmental meetings as *agents du pouvoir exécutif.*[74] Hence they were administrative agencies whose local legislative activities were extremely narrowed down already in the beginning. Later on, by means of a variety of methods, these activities were reduced practically to nil (e.g. by limiting the passage of local resolutions to the right of petition).

The Belgian Constitution of the 7th February, 1831 appears to have brought about a break in the general trend. It mentions the local government organization as the fourth alongside of the legislative, executive and judicial powers. Article 31 of the Belgian Constitution declares: "Questions exclusively of a municipal or provincial nature shall be settled by the municipal or provincial councils on the ground of principles laid down in the Constitution." However, this general statement of the Belgian Constitution has proved to be a fiction only.—And this has become the case in the other European countries, too: e.g. in Prussia since the introduction of the Stein–Hardenberg municipal statute (1808); in England, the country of the oldest local governmental systems, since the 19th centuries; in Hungary since Act XXI of 1886. The territorial and local systems of self-government have become merely the simple executors of the provisions of the central administrative agencies. The extremely rigorous and close central control and supervision, in particular, rendered any independent activity impossible.

Carl Schmitt has circumscribed the rejection of self-government activities as follows: "In a democracy the people is in all cases the whole people of a political unit, and not the electorate of a community or a district."[75] Adamovich said that " 'self-government' . . is a determined section of public administration".[76] Essentially the

[74] *Archives parlementaires*, 1789–1799, Vol. IX, Librairie Administrative de Paul Dupont, Paris 1875, p. 207.

[75] Carl Schmitt, *Verfassungslehre*, München–Leipzig 1928, p. 273.

[76] Ludwig Adamovich, *Handbuch des österreichischen Verwaltungsrechts*, Wien 1954, p. 61.

same position was taken by Tomcsányi, the Hungarian bourgeois writer on public law: "There is talk . . . of the original (natural) and delegated competence of the local self-government bodies . . . This is a peculiar and at the same time inacceptable idea of self-government, which rejects to see in it one of the organizational manifestations of state administration."[77]

Self-governments did not count, in particular, upon the creation of legal rules even of local significance, i.e. upon joining the legislative organization at any stage.[78] Administrative decentralization was and remained the objective of self-government as long as it existed. Even this decentralization objective suffered injuries in the period of general state centralization, i.e. in the age of imperialism. The de-concentrated administrative agencies were forging ahead ever more emphatically. In most of the countries the appointment of whole groups of local government officials was assigned to the ministers, mostly to the minister of home affairs, who was in charge of the supervision of local governments. In reality the specialized agencies in local governments have parted with self-governments and become agencies of deconcentrated public administrations.

Notwithstanding all the above facts, we may state that self-governments may and did perform useful functions in certain periods and in certain countries. There has ever been, as is known, a great deal of difference between them, as there is e.g. today between the Anglo-Saxon self-government practice and the German or French centralization.

6. REPRESENTATION IN THE BOURGEOIS STATE

Yet another institution has to be analyzed in this chapter, namely representation including, besides its characteristic features, evolution preceding the socialist revolution. As it is, the new socialist state institution of representation is a scope requiring considerable and thorough study. The antecedents in the bourgeois State of the repre-

[77] Móric Tomcsányi, *Magyarország közjoga* (The public law of Hungary), Budapest 1940, pp. 403 and 504.

[78] Most of the by-laws brought under regulation such organizational questions that related to the administrative machinery. Then, at other places the central control of regulation was guaranteed by 'specimen by-laws'.

sentation system have to be studied also because the idea, content, extent and consequently also the form of representation emerge with respect to both the legislative power and self-government.

Involved by these problems, we have to historically delimit the scope of our study. For our part we are interested here in the period only when the principle of popular sovereignty manifested itself, i.e. the bourgeois phase of state representation system, and retrospectively in the age of bourgeois enlightenment, in general, the birth of bourgeois philosophy and jurisprudence.

On a theoretical level the question of representation first appeared in French philosophy. In England, although there the representative system had come into being many centuries before, interest was focussed on the theory of representation only much later. The first author of standing touching on the question of representation was exactly Montesquieu.[79] He considered the representatives the delegates of the people, of the electorate, hence—even if with limitations—he recognized the right of instruction. He thought that representatives had to obey general instructions only.[80] The main line of Montesquieu's position may be drawn as follows: (a) representatives should be given general political guiding principles by their constituents; (b) representatives may act freely within the limits defined by the general guiding principles; (c) representatives are bound to render account to the electorate. This is an imperative mandate, only not an extreme one, in a prohibitive form, as practised in the feudal assemblies.

The Montesquieuian idea manifested itself, first as a moot question, then finally as an approved position, at the first phase of the French Revolution. Originally the constituencies (*bailliages and sénéchaussées*) introduced the earlier system of a fixed mandate. As often as a question unknown in the earlier instruction emerged in the *Assemblée nationale*

[79] Montesquieu, *Op. cit.*, Vol. XI, Chap. VI, p. 256.—"Le grand avantage des représentants, c'est qu'ils sont capables de discuter les affaires. Le peuple n'y est point du tout propre; ce qui forme un des plus grands inconvéniens de la démocratie."

[80] Montesquieu, *Ibid.*, p. 257.—"Quand les députés, dit très-bien M. Sidney, représentent un corps du peuple comme en Hollande, ils doivent rendre compte à ceux qui les ont commis: c'est autre chose lorsqu'ils sont députés par les bourgs, comme en Angleterre."

the representatives had to apply to their constituents for approval or instructions. However, this position encountered the resistance of the National Assembly already at an early moment. In fact the revolutionary legislature had justly the feeling that this exaggerated system of mandate, inherited from the age of feudal representation tied down their hands completely. Therefore already on the 7th July, 1789, a month and a half prior to the adoption of the Declaration of the Rights of Man and the Citizen, Talleyrand could say: "What is the mandate of the representative? An act which confers on him the authority of his constituency, which appoints him the representative of his constituency and through this of the whole nation."[81] Abbé Sieyès, in order to undermine the authority of the imperative mandate, draws a line between a limitative and prohibitive mandate, the former being the Montesquieuian system, while the latter being the earlier system characterized by instructions binding in every matter.[82]

The National Assembly passed the motion of Sieyès.[83] By this resolution the debate on the question was not closed. Rabaud de St-Etienne in September 1789 once again raised the need for an imperative mandate: "There is nothing common in these two words 'representative' and 'perpetual'. Anyone of the representatives may be recalled, and when he cannot be recalled he is a representative no more."[84] However, the National Assembly stood up against this idea and no longer defending the Montesquieuian idea of a limitative mandate, henceforth advocated the free mandate. "Undoubtedly", said Sieyès, "the representatives are present in the National Assembly not to announce the already formulated desires of their immediate constituents, but to debate freely, and cast—on the ground of their

[81] *Archives parlementaires*, 1787–1860, Vol. VIII, Librairie Administrative de Paul Dupont, Paris 1875, p. 201.

[82] *Ibid.*, Vol. VIII, p. 207.

[83] ". . . la nation française étant toujours tout entière légitimement représentée par la pluralité de ses députés, ni les mandats impératifs, ni l'absence volontaire de quelques membres, ni des protestations de la minorité ne peuvent jamais ni arrêter son activité, ni altérer la liberté, ni atténuer la force de ses statuts, ni enfin restreindre les limites des lieux soumis à sa puissance législative, laquelle s'étend essentiellement sur toutes les parties de la nation et des possessions françaises." *Ibid.*, Vol. VIII, p. 207.

[84] *Ibid.*, Vol. VIII, p. 569.

opinion so formed—their votes on what the National Assembly may enlighten anyone of them with all its clarity". Also it was Sieyès who said that "... the delegate is the whole nation's; his constituents are all citizens ... Therefore no imperative mandate or positive instruction exists or may exist in respect of the representative unless the instruction of the nation".[85] This position was followed by the Section of the 22nd December, 1789 Franchise Act referred to earlier: "The representatives elected in the *départements* to the National Assembly shall be considered the representatives not of a single *département*, but of all *départements*, i.e. of the whole nation." This system of representation has received in bourgeois public law the designation 'absorptive representation'. This idea was then completed by Article 2, Title III of the Year III Constitution, which declared that in the kingdom there was delegated power only.—Hence the French position at the first phase of the Revolution, definitely, opposed all forms of an imperative mandate and arrived at the idea of the absorptive mandate.

Substantially at the same time the question also occupied the English Parliament and even the public. In point of fact the roots of the rejection of an imperative mandate go far back in English parliamentary life. In the opening years of the 17th century, at the time of the War of Spanish Succession, the constituents of the County of Kent submitted a petition against the Government to the Tory Parliament. The petitioners were arrested on the ground that they had no right to influence the debates of Parliament.[86]—It was Burke who stood up most effectively against the idea of an imperative mandate, in his famous speech addressed "To the Electors of Bristol, on his being declared by the sheriffs, duly elected one of the representatives in Parliament for that city."[87] Here he expounded: "But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and con-

[85] *Ibid.*, pp. 595 and 596.

[86] Mentioned by Ernst Fraenkel in *Die repräsentative und die plebiscitäre Komponente im demokratischen Verfassungsstaat*, Tübingen 1958, p. 10.

[87] Edmund Burke, *The Works on the Right, hon. Edmund Burke, with a biographical and critical introduction* ... Vol. I, London 1834, Holdsworth and Ball, p. 180.

science—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenour of our constitution."—This position taken by Burke was in fact the direct consequence of an earlier English constitutional custom, the principle of virtual representation. What is of interest here is that it was exactly Burke who attacked this principle in favour of the North-American English colonies. Originally virtual representation meant that Parliament represented the whole kingdom 'virtually', i.e. irrespective of whether or not the particular regions had a true representation in Parliament. When Burke pronounced the slogan 'no taxation without representation' he stood up against the constitutional custom of virtual representation and insisted on a separate representation of each territorial unit, whereas in his speech to the electorate of Bristol he revived the theory that accepted Parliament as the organ of virtual representation and not as the assembly of the representatives elected and influenced by the constituencies. When speaking in favour of the North-American English colonies he said that the constituents of each territorial unit had a claim to representation, still this claim was satisfied by the election of the member, and did not extend to a true mandate, to the influencing of the members through instructions.

Dicey, this most prominent scholar of English constitutional law at the turn of the century thought it was obvious that "any expressions which attribute to Parliamentary electors a legal part in the process of law-making are quite inconsistent with the view taken by the law of the position of an elector. The sole legal right of electors under English constitution is to elect members of Parliament. Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament."[88]

The theory of Dicey was directed not exclusively, not even primarily against the theory of direct democracy. The target of his theory was any kind of influence, guiding of the members, by the electorate.

The prohibition of an imperative mandate has been tied up with yet another watchword. In the wordings of the constitutional charters there occurs often the responsibility of the representatives before

[88] A. V. Dicey, Introduction to the Study of the Law of the Constitution, London 1964, pp. 337–8.

their own conscience. (These platitudes have been taken up even in the latest bourgeois constitutions, so e.g. in the Bavarian of 1946 [Sec. 16 (2)], in clause 1, Sec. 38 of the Fundamental Law of the German Federal Republic, in Sec. 48 of the Constitution of Iceland, in Sec. 79 of the the Constitution of the Rhine Palatinate, etc.). Naturally, the responsibility of conscience has not legal effect whatever.

However, in recent literature on political law and the theory of State of the capitalist countries the question of representation is treated from an altogether different aspect. Partly it denies the existence of the institution of representation, partly it suggests other forms of indirect representation or of mediatization. In the following the former variant will be analyzed first.

In the period following upon the First World War it was Kelsen who first stated the absence of representation in parliamentarism. For want of an imperative mandate Kelsen speaks of the 'fiction' of representation. So popular sovereignty was superseded by mere franchise,[89] although it was this fiction which "should legalize parliamentarism from the standpoint of popular sovereignty".[90] Carl Schmitt, in 1928, suggested that the expiry of representation was an accomplished fact. "The representative character of parliament and of the representatives have ceased to exist", he wrote. "Therefore no political decisions take place in parliament. Essential decisions are made outside parliament. In this case parliament acts as some sort of a technical switching office in the administrative organization of the State."[91]

Another section of the bourgeois scholars of public law explains the death of representation in the parliamentary system by making comparisons between civil-law representation and public-law or constitutional representation at the very outset, and will recognize the former only as true representation. Leibholz—whose work on representation, originally published in 1929, sums up the opinions exposed between the two World Wars in the Western world most extensively—wants to discover a private-law approach in several figures of the French Revolution (so in Sieyès and Talleyrand), for the very reason

[89] Hans Kelsen, *Vom Wesen und Wert der Demokratie*. Tübingen 1929, p. 25.
[90] Hans Kelsen, *Allgemeine Staatslehre*, Berlin 1925, pp. 30 and 31.
[91] Carl Schmitt, *Verfassungslehre*, München–Leipzig 1928, p. 319.

because they advocated the contemporaneous, relatively consistent idea of representation.[92] The problem has been approached by Giacometti from a different aspect. "The popular representation is a representation of the people from neither the private-law, nor the public-law point of view. As a matter of fact the members of the popular representation, i.e. the representatives, are not bound by instructions, but are legally independent of these. Legally the will of the popular representation does not manifest itself as the will of the electorate . . . the constituents are not specific subjects at law."[93] The validity of the theory of the fiction of representation is not weakened by the fact that in particular during the first three decades of the 20th century the institution of the recall was introduced in a few bourgeois states. For example, there was the question of a period of evolution in the United States of America, when public opinion believed that the panacea of the corruption of public administration and of the elected bodies was the introduction of some of the institutions of direct democracy, the recall of the representatives and the elected functionaries. However, soon it was found in view of the complexity of the bourgeois state machinery these could not become expedient means. It was for this reason that until 1952 recall was resorted to on two occasions only in the twelve union states of the United States of America, and even then not representatives were recalled.[94] In the majority of union states, where during the years of prosperity the system of recall had been introduced, the relevant statutes were subsequently set aside. (Characteristically, in Switzerland the constitutions of only seven cantons recognize the system of recall.)

In addition to this theory of a denial of the system of representation, the other substantially anti-representative theory speaks of the State of parties (*Parteienstaat*). Certain bourgeois jurists comprehensively discuss this under the heading of the participation of the political 'estates' in democracy. Werner Weber believes to have discovered the political power proper in "the pluralism of oligarchic groups of

[92] Gerhard Leibholz, *Das Wesen der Repräsentation*, Berlin 1960, 2nd ed., p. 85.

[93] Zaccaria Giacometti, *Das Staatsrecht der schweizerischen Kantone*, Zürich 1941, p. 291.

[94] Michel Linon, *L'organisation politique et administrative des Etats-Unis*, La Chapelle–Montligeon, 1952, pp. 29 and 40.

power"[95] in the State of the GFR and declares that the fact "that only few are ruling is not in contrast with the essence of democracy, but is in the nature of things for each State, in particular for modern mass democracy".[96] Hence the party oligarchy, the leaders of pressure groups, the lobbyists replace representative agencies of all kinds. The Fundamental Act of the German Federal Republic itself, rather strangely, was the first to include provisions on the functions of the political parties: "The parties co-operate in the formation of the political will of the people." (Article 1, Sec. 21.) However, the functions of the parties extends much further in most of the Western bourgeois countries, in particular where the two-party system has become established. In the West-German, and in its wake also in the French, literature there is already much talk of a 'mediatization' of the people by the parties. The fiction of mediatization wants to prove that the old institution of representation has in fact not ceased to exist, it is not dead, but comes to existence through the mediatization of intermediate agencies. Nominally the member is a 'representative of the people', yet in reality he is that of one of the political parties.

[95]Werner Weber, *Spannungen und Kräfte im westdeutschen Verfassungssystem*, Stuttgart 1951, p. 49.

[96] Werner Weber, *Op. cit.*, p. 58.

CHAPTER TWO

SOCIALIST INSTITUTIONS OF STATE ORGANISM

1. EXPERIENCES OF THE COMMUNE OF PARIS IN THE ORGANIZATION OF A STATE

A socialist State, or a socialist society, cannot take over the governmental mechanism of an exploiting, capitalist State, even at the expense of rehabilitating it. A new governmental organism, and for the new organism a new socialist theory will be needed. As is known this new theory was born, in its principal outlines, in the writings of Marx, Engels and Lenin. Still, an enormous mass of experiments had to flow past from the days of the Communist Manifesto down to the Soviet reality of present days. In addition, conclusions of general validity had to be drawn from these experiments. Furthermore, it should be remembered that experiments in state craft are coming into existence out of historical struggles, and not created in a test-tube.

From 1871 onwards Marx and Engels were turning to the experiences of the Commune of Paris in matters of State organization. Both Marx and Engels generalized these experiences without, however, being oblivious of the weaknesses of the Commune and the inconsistency of its policy. Marx, in his work The Civil War in France, summed the features of the new state organism as follows: (a) the legislative and executive powers had to be deposited in the hands of an elected body, the Commune (this had to be a working, and not a parliamentary, body); (b) the central representative assembly, i.e. the one of highest degree, had to be elected by an indirect procedure; (c) an imperative mandate had to guarantee that the delegates obeyed the precise instructions of the electorate (i.e. such instructions that extended to all matters); (d) the representatives should be revocable or removable; (e) the civil servants should be strictly responsible for their acts (in this connexion it should be noted that the administrative mechanism would remain, only its staff would be reduced and its competence limited); (f) in the communities local government

bodies would operate, however, not to counterbalance the central state power.[1] When in 1917 Lenin summed up the criteria of a Commune type state power he expounded these ideas on the following lines: "(i) The source of power is not an Act of legislation, previously debated on and then approved, but the direct and local initiative of the masses emerging from below; to resort to a phrase in current use: the direct 'seizure' of power; (ii) the replacement of the police and the army, as institutions segregated from the people and even counterposed to it, by the direct arming of the whole people; if a power of this type existed the order of the State would be defended by the armed workers and peasants, i.e. the people in arms; (iii) the replacement of the civil servants, or the bureaucracy, by the direct authority of, or at least the direct control by, the people. The civil servants would not only be elected, but upon demand of the people even replaced, i.e. the civil servants would be turned into simple commissaries. The privileged class of persons who occupied 'good jobs' rewarded with high bourgeois salaries, would be turned into a class of workers belonging to a specialized 'branch of service', where salaries would not be any higher than the usual wages of good workers."[2]

From these statements of Lenin the following questions appear to have a bearing on the subject-matter of the present discussion. In line with those said above the Commune type of power, the socialist State, is built upon the consistent theory and practice of popular sovereignty. The source of power is the population of the State, and that not only through the exercise of the franchise, but also through 'direct action', or direct initiative, in the form of a direct moulding of state will. As regards the executive power this too would be taken over by the population, or subjected to its control, i.e. to people's control. It was in this sense that Lenin spoke of this power in a way as if on the one part it would be the State itself, viz. the centralized, strong State, yet on the other, not the State in a proper sense, since this State would be an embodiment of the masses, the people as a whole; it would not

[1] Karl Marx, *The Civil War in France*, Martin Lawrence Ltd., London 1933, p. 40.

[2] V. I. Lenin, *Selected Works*, Vol. VI, International Publishers, New York 1943, p. 28.

stand above the people and would cease to be a segregated, privileged, irremovable mechanism.

The outlines of the organization of the State as drawn up by the Commune of Paris (in fact during the brief spell of life granted to it little more could be done) confirmed exactly that institutions earlier unrealizable and incompatible, such as popular sovereignty, direct and representative democracy, would of necessity come into being under the conditions of a socialist State and that their reconciliation, their concerted influence followed as a matter of course.

What will be most striking in a comparison between the theory of the Commune of Paris and the contemporaneous bourgeois theory of the State is the merger of the legislative and the executive organs, i.e. the fusion of legislation and administration. The forms of realization of this fusion are extremely variegated: the participation of the elected members of the Commune in their committees, the operations of the executive, the direct function of the population in the formulation of legal norms and their enforcement, the responsibility of the civil servants before the agencies of the Commune. It should be noted, however, that neither the leaders of the Commune (although there were a fair number among them who were harbouring utopistic ideas), nor Marx and Engels, or Lenin, ever thought of a solution which would have implied the wholesale liquidation of the official machinery in the period following after the revolution and the assignment of its functions to elected representative agencies or their members. The abolition of a separation of legislation and administration merely meant the destruction of the alienated old machinery and its replacement by a new staff formed of a small number of members responsible to the representative agencies, indirectly to the people, the working population. This would be a well proportioned administration exactly suiting the ends of reasonable functions; and any of these, if necessary, could be entrusted to the representative agency or its members. In addition, like in all progressive theories of constitutional law, in the system of state construction of the Commune the leading principle is the unquestioned priority of the representative, i.e. elected organs. Even where governmental functions were not entrusted to the corporate agencies of the Commune, some sort of an indirect dependency on these agencies could be demonstrated.

2. THE SOVIETS IN THE 1905/1907 and 1917 REVOLUTIONS

The second crucial test of the socialist formation of the state organism was the Russian proletariat's first great revolution in 1905–1907. The Russian working classes and part of the peasantry devised new fighting forms in the course of their struggle: the most significant of these forms were the soviets, the councils of the worker delegates, to be joined later by those of the soldiers, and the peasant committees. In the course of the revolution the participation of a Marxist party, the Russian Social Democratic Workers' Party—in particular its Leninist, Bolshevik wing–soon recognizing the new fighting forms, was increasing in significance. This revolution had two peculiarities which had been unknown to the Commune of Paris. In the first place it has to be emphasized that the presence of the conscious element leading the revolution, i.e. of the Marxist party, had brought about fundamental changes in the situation. Henceforth the leading role of the Marxist party became an imperative concomitant phenomenon and condition of any revolutionary movement of significance, and as will be seen, of the operation of all socialist governmental mechanisms.

The other characteristic feature of the soviets of 1905 was that unlike the agencies of the Parisian revolution, the soviets became the agencies of a political mass strike from the moment of their birth, i.e. they were mass organizations, the mass organizations of the working classes. While the Commune of Paris came into being as a governmental agency, essentially as a local government body, no authoritative or governmental traits could be discovered in the operations of the soviets at the outset. However, as soon as the economic strike had undergone a metamorphosis and became a political one, and the revolution was put on the agenda, organizational functions emerging in the course of the struggle were assigned to the working classes' existing and armed organs, i.e. the soviets. When in the course of the revolution, at least locally, the authority of Tsarism could be shattered, and in certain areas the outdated power organs could be overthrown, the soviets took charge of the functions of the new political machinery. By this act they there changed over into an authoritative political organization, however, still preserving their earlier, mass organizational form. Moreover, since these soviets

refused to recognize the central agencies, the machinery of Tsarism, it was obvious that notwithstanding their local character they were forced to take charge of the functions of the central agencies on an all-national level.

The soviets of 1905, as Lenin said, were commune-type agencies. In the first place because they relied on the broad masses. "This is a power which is open to all. It does everything under the public eye, it is accessible to the masses, it arises directly from the masses, it is the straight and direct organ of the masses of the people and the will of the masses."[3]

Although in 1905 the soviets operated in a limited number of areas only — and only for a very short time — in these areas they exercised all governmental functions at that time, in the interest of the toiling people and in its service. The soviets were coming into existence as non-party labour organizations, the organs of a political mass strike, then became the fighting organs of the general revolutionary struggle, the germs of the revolution, and in certain areas the holders of all authoritative functions.[4] The soviets, these new, socialist agencies of state power, brought about no national machinery. Still their local activities provided a foretaste of what would be—in its principal traits—the governmental organism after the nation-wide victory of the socialist revolution.

In the revolution of 1917 the masses formed the soviets, i.e. in this case, during the first phase, the conscious labour movement followed in the wake of the instinctive mass movement. However, soon the turn came when the most class-conscious strata of the working classes, in the first place the Bolshevik Party, made use of this instinctive movement for the further expansion of the revolutionary struggle, and took the lead of it. As early as the end of March 1917 Lenin in the third of his series entitled *Letters from Afar* linked up the idea of the coming power, i.e. of the new State, with the soviets of the

[3] V. I. Lenin, *Collected Works*, Vol. 10, Progressive Publishers, Moscow 1965, p. 244.

[4] Cf. the Resolutions of the 4th (Unifying) Congress of the Russian Social Democratic Workers' Party in *Коммунистическая Партия Советского Союза, в Резолюциях и Решениях Съездов, Конференций и Пленумов ЦК*, Часть, I. Государственное Издательство Политической Литературы, Москва 1953, стр. 110.

workers' delegates (and that of the delegates of soldiers and peasants belonging to the different layers of the peasantry). "The proletariat... has to organize and arm all poor, exploited, sections of the population in order that these directly take over the governmental agencies, so that they constitute the institutions of this power" he wrote in the same letter.[5]

Lenin considered the organization of the soviets the 'weak, primitive' form from which the new State would be brought into existence, i.e. the State which had ceased to be a State in the proper sense of the term. The State continues to exist as a State, but in fact it is a repressive organization where the squads of armed men are to fight counter-revolutionary attempts. So it is not a State in the sense of the original, alienated mechanism, because the squads of armed men embody the masses, 'the people as a whole'. Therefore he advocates the soviets of the workers', peasants' and any other delegates as a counter-power in the 'State', as the forerunner of the 'withering away' of any State.[6]

In the preparatory phase of the socialist revolution the Bolshevik Party's battle slogan demanded 'all power for the soviets', which not only meant the conquest of power for the proletariat, but at the same time the method of a subsequent organization of the State. As a matter of fact, for the future, this watchword meant that the homogeneous network of the soviets extending from the villages to the supreme agency of the country would exercise full power, it would not tolerate other 'parliamentary' (i.e. purely debating and non-operative) or bureaucratic agencies (whose officials were above the people, owed their positions to appointment, had not to render account, and could not be recalled) in a similar relation to the people. After the revolution the watchword 'all power' in the hands of the soviets meant the fulness of the power of the working class, the undivided authority, the denial of a division of the branches of power, the subordination of all functions, hereincluded production and distribution, to the soviets expressing and embodying the sovereignty of the people.

[5] V. I. Lenin, *Letters from Afar*, Lawrence et Wishart Ltd, London (no year), p. 27.

[6] V. I. Lenin, *Selected Works*, Vol. VI, International Publishers, New York 1943, p. 74.

The problem of the power of the soviets was raised during two phases of the year 1917, viz. in the first phase of the bourgeois democratic revolution, in February, and in particular in April; and then in the months preceding October, when the Bolsheviks ensured a majority in the soviets, in the first place in the soviets of the workers' delegates (and in the soviets of the peasants' delegates as well), the left-wing social revolutionaries—who at that time marched together with the Bolsheviks in all essential problems—carried authority. Lenin and the Bolshevik Party did not doubt that the soviets would change over to a revolutionary power, even when there was a low-ebb in the revolution. Lenin and the Bolshevik Party had defined also the future functions of the soviets. However, in September, the many problems of the power of the soviets, and the organizational forms of this power, came to the fore with particular emphasis. The earlier possibility to go ahead with the two kinds of organ simultaneously, viz. the soviets and the local democratic self-governments, did not work any longer; in fact the Zemstvos and other local-government bodies plainly showed their inability to purge themselves of the counter-revolutionary and bourgeois landowner elements. It was the soviets only that remained as the potential agencies of the new statehood, of the worker and peasant power, on both a local and national basis. Although the proletariat was unable to get hold and set into motion the old state mechanism, still it had enough strength to smash all that had served in the old governmental mechanism as a means of oppression, what bore a thick-headed, irreparable bourgeois character and to replace it with a new mechanism of its own. It was exactly this mechanism, embodied by the soviets of the workers', soldiers' and peasants' delegates, about which Lenin wrote with the title *Can the Bolsheviks Retain the State Power?*[7]

Lenin enumerated such of the advantages of the soviet mechanism that turned it into a 'commune-type' organism and confronted it to all power organizations of the exploiting classes. Such advantages were among others the permanent, indissoluble bonds tying it to the masses, the elected character of the soviets, the recallable character of delegation, and many others. One of the advantages Lenin pointed out was that "in the person of the elected representatives of

[7] V. I. Lenin, *Op. cit.*, Vol. VI, p. 262.

the people the legislative functions could be united with that of the *enforcement of the laws*" (italics by Lenin).[8] On the other hand here too Lenin called attention to the fact that the new statehood could not be established unless the outdated social order was overthrown. Under the conditions of 'dual power', and even more so under those brought about after June 1917, the soviets were unable to live up to expectations. "The soviets cannot develop," he writes in the same work, "cannot display their capabilities and abilities to their full extent, unless they get hold of the whole state power; otherwise they have nothing to undertake, they would remain simple embryos (and nothing can remain in an embryonic state for too long), or toys. The 'dual power' paralyzes the soviets."[9]

Already before October the principal traits of the new mechanism had begun to take shape: the full powers of the soviets, election and recalling of the delegates, the imperative mandate, the unity of legislation and execution, subordination of production and distribution to the soviets, or at least supervision by them.

3. STRUCTURE OF THE SOVIET STATE ORGANISM FROM 1917 TILL THE APPROVAL OF THE CONSTITUTION OF 1936

A first attempt to settle the details of the Soviet state organism was made in the October Decrees following after the Great October Socialist Revolution. A characteristic feature of this period, which was not restricted to the October days, but extended over three quarters of the year, was the absence of a uniform constitutional rule. The government tried to define the fundamental theses of the later constitution by bringing under regulation certain groups of problems of major or minor importance by way of summarizing legal rules. This method of legislation so to say dictated the adoption of the mostly instinctively created structure of the soviets and their methods of operation. At that time it was out of the question to introduce new forms within the soviet organization, in particular all ideas of the elaboration of some sort of a general scheme for the soviet system had to wait. An over-all national relationship among the separate

[8] V. I. Lenin, *Op. cit.*, Vol. VI, p. 264.
[9] *Ibid.*

soviets of the various strata of society (viz. the councils of the workers and the poor peasantry) came into being only after a certain time. Unification first set in on the summits. These superior soviet agencies were elected indirectly, in the same way as before October.

Among the October Decrees establishing the structure of the governmental system the most significant was the one promulgated on November 8, 1917, on the Full Powers of the Soviets. Accordingly, all power was conferred upon the soviets. This meant that the overthrown provisional government and its delegates were deprived of all authority and the chairmen of the soviets were attached to the revolutionary government, i.e. subordinated to this agency.[10] The All-Russian Congress of the soviets of the workers', peasants' and soldiers' delegates, and the Central Executive Committee elected by the congress were made the controlling authorities of the activities of the council of the people's commissars by a decree promulgated also on November 8, i.e. the decree On the Formation of the Council of the People's Commissars.[11] The particular branches of state life were controlled by committees created under this decree. The people's commissars were made chairmen of these committees. Hence in respect of Russia the first organizational pattern can be described as consisting of the All-Russian Congress of the soviets of the workers', peasants' and soldiers' delegates, the Central Executive Committee, the council of the people's commissars (commissars and committees) and the soviets of the smaller territorial units (their chairmen).

The priority of the soviets, their monopoly of power were emphasized also by the provisions issued in the November days. The newly created agencies were in a variety of forms attached to the soviets. So e.g. the resolution on workers' control (No. 16) of November 29, 1917, although it established the complete local and national system of control, spoke of the councils of municipal and regional industrial workers' control as the future agencies of the soviets of the workers', peasants', and soldiers' delegates.[12] One may be tempted to use a modern term by saying that workers' control operated in a dual subordi-

[10] *История Советской Конституции, в документах* (History of the Soviet Constitution, in documents) 1917—1956, Moscow 1957, p. 51.
[11] *Ibid.*, p. 43.
[12] *Ibid.*, p. 64.

nation. In fact it performed its functions in subordination partly to the local soviets, partly to the All-Russian council of workers' control. Another set of problems, which was characteristic of the first period, has to be touched upon here, viz. the problems implied in the dependence of the delegates on the constituents, or on the electing agencies. In its Decree of December 7, 1917, the Central Executive Committee, when speaking of recall, did not speak particularly of a recall from the soviet agencies, still, as its statements had general validity, the fundamental considerations were accepted as a point of departure at the valuation of the mandates. In its first section the Decree stated: "Any elected agency or meeting of delegates cannot be considered truly democratic and in fact representing the will of the people, unless the right of the constituents to recall the person or persons elected by them is recognized and practised." Then in the section containing the resolution it is stated: "The congress of the soviets of the delegates of workers, soldiers and peasants of each constituency convened on a par may call new elections in all municipal, national and other representative organs . . . Upon request of more than one half of the constituents of the constituency the soviets are bound to call new elections."[13] Hence the system of an imperative mandate was maintained at all stages. The right of recall from the agencies elected by an indirect method was deposited in the hands of the soviets operating at the lower grade. (It should be mentioned that at that time in the towns the majority of the delegates were elected by factories' constituencies. In this case the delegates had to render account of their activities to the workers of the factory, manufacturing plant, etc.)

In the closing days of the year 1917 a few rules of detail were promulgated purposing the consolidation of the governmental organism. An appeal of the Commissariat of the Interior declared that guidance and control of the soviets had been vested by the national soviet organs in the Commissariat of the Interior. This appeal (dated on December 24) emphasized that "in the communities the agencies of the local power, the soviets, are the administrative agencies, to which all institutions irrespective of whether economic, financial, or cultural-educational, have to be subordinated."[14] The Commissariat

[13] *Ibid.*, pp. 68–9.
[14] *Ibid.*, p. 94.

of the Interior defined the rights and obligations of the soviets in all their details in the form of legal rules, or instructions, on the 6th January, 1918.

In conformity with the instructions the soviets of the delegates of workers, soldiers, peasants and agricultural labourers were considered local agencies, which had full autonomy in settling problems of a purely local character. On the other hand they had to proceed with due regard to the decrees and provisions of the central organs as well as of the soviets of larger territorial units. Problems of administration, economy, finances and cultural-educational matters of a local character were assigned to the competency of these soviets. The soviets enforced the decrees and regulations of the central authority, invited the population to a participation in the enforcement of statutes, issued compulsory regulations in matters of requisitioning and confiscation, on the levying of fines, proceeded in the liquidation of the counter-revolutionary press and arrested anti-soviet elements. The executive agencies were elected from among the members of these soviets. In conformity with the instruction of the Commissariat of the Interior these executive agencies were given the designations executive committee or presidium.[15] Similarly as other legal norms issued at that time the instructions appointed the soviet agencies of the local administration (upravlenie). However, here and also in subsequent regulations the term was merely meant to indicate that the agency had no legislative authority implying the establishment of rights or obligations extending to the whole country.

As regards the central agencies, until the approval of the constitution these operated essentially in the form established by the Second All-Russian Congress of the Soviets. The Council of the People's Commissars elected by the All-Russian Congress of the Soviets and the All-Russian Central Executive Committee superseding it, remained the core of the central organization. To this a few executive agencies invested with special authority were added, so the Supreme Economic Council called to life by virtue of the decree of the All-Russian Central Executive Committee on the 14th December, 1917, further the All-Russian Extraordinary Committee, the agency fighting counter-revolution, profiteering and sabotage.

[15] *Ibid.*, pp. 96–7.

The most characteristic decree of the following phase was the *Declaration of the Rights of the Toiling and Exploited People* passed by the Third All-Russian Congress of the Soviets. In point of fact the Declaration promulgated by the Third Congress did not contain new ideas, since the agencies mentioned in this Declaration were of earlier creation and had been organized under other statutory provisions.

A clear-cut reference to the system of the governmental agencies, the types of organizations may, however, be discovered in a little-known regulation from this period (April 1918). This is the regulation on the Soviet Socialist Republic of Turkestan, passed by the Fifth Congress of the Frontier Region (kray) of Turkestan. The regulation mentioned the following types of organization: (a) the supreme legislative organ (the congress of the soviets of workers, soldiers, peasants and *Moslem-dekhans*, i.e. working peasants); (b) the supreme permanent legislative organ (the Central Executive Committee); (c) the organ in charge of executive functions and public administration (the council of the people's commissars elected by the congress of soviets, formed of sixteen members); (d) the agencies of the local power (the local soviets and their executive committees).[16]

The regulation made no mention of the other executive agencies referred to above. What was striking in this regulation in comparison with the earlier were in particular two traits, viz. first, the mention of two legislative agencies. This confirms as will be shown subsequently that until the introduction of the Soviet Constitution of 1936 the soviet constitutional rules did not recognize a genuine exclusiveness, or monopoly of legislation. Secondly, unlike the instructions of the Commissariat of the Interior, quoted earlier, this regulation did not consider the local soviets as administrative agencies, but in conjunction with the executive committees, as the agencies of the local power. However, in our opinion, this distinction cannot be considered a conscious one.

In April 1918 the time had come for drafting the first Soviet constitution. In point of fact the *Declaration of the Rights of the Toiling and Exploited People* was the first foundation-stone, which the Soviet power laid down when it came to build up a constitution. It was this foundation-stone on which drafters of the constitution relied.

[16] *Ibid.*, p. 126

The declaration influenced the constitution insofar that by breaking away from the forms and methods of bourgeois constitutions it was the first to deal with the fundamental problems of society and economy. These were the points of departure in establishing the governmental organization, and defining its functions and the methods of building up the State.

The first soviet constitution, i.e. the Constitution of the Russian Socialist Federal Soviet Republic was approved of after protracted debates by the Fifth All-Russian Congress of the Soviets on July 10, 1918. The *Declaration of the Rights of the Toiling and Exploited People* was made its preamble. As has already been mentioned this Declaration gave the keynote to the Constitution, in particular to Articles 1 and 2 on the governmental organization. Article 1 declared Russia the republic of the soviets of the delegates of workers, soldiers and peasants in that the fulness of both the central and local power was in the hands of the soviets. This definition confirmed the principle of unity and the uniform exercise of power. The constitution conferred all power on the soviets, i.e. under Article 10 on the whole working people united in the municipal and rural soviets. Still this latter term deserves a deeper-going analysis. This is essential the more because in the preparatory stage heated debates had taken place in the committee on the question of federation, and also on that of a geographical federalization. (There had been views insisting on the federalization of the provinces, or regions (oblasts), while others — going beyond this—considered the new State some sort of a federation of soviets, where power was essentially in the hands of local agencies, whereas the centre participated in what was left over of state power. This opinion had been opposed to the Leninist political line, the fundamental principles of which spoke of a 'strong All-Russian soviet power'. Lenin underlined the need for centralization.[17] It was now that the term 'republic of the soviets' was superseded by the term 'soviet republic'. This assertion of the principle of democratic centralism meant the victory of the Leninist line in the process of making a constitution.)

In the light of these what construction should now be given to

[17] This is of what Lenin speaks later; cf. *Полное Собрание Сочинений* (Collected Works), Том 37, Государственное Издательство Политической Литературы, Москва 1963, стр. 21–22.

Article 10 of the Constitution (which for that matter conforms to Article 1 of the fundamental principles)? Does this article not defeat the correct efforts for a centralization? In our opinion Article 10 was the correct formulation of the actual constitutional position. In the first place in this period the population assembled in the soviets dissociated itself from the counter-revolutionary bourgeoisie withdrawing from the soviets not only in point of principle, but also in practice. So the definition 'republic of the soviets' expressed the true power relations or fronts in the society of the period. Secondly, at that time, with slight corrections, the soviet organization was built up on the principle of indirect elections. Hence power was deposited in the central and local agencies expressing the will of the population united in the soviets indirectly. Each superior and central agency indirectly represented the population, on the ground of the manifestation of the will of the municipal and rural soviets.

The system of the governmental agencies is presented in Title III. This splits up the central organization into three parts, viz. the All-Russian Congress of Soviets, the All-Russian Central Executive Committee, and the Council of the People's Commissars. Article 24 describes the Congress as the supreme sovereign organ; under Article 31 the Central Executive Committee is the supreme legislative, dispositive, and supervisory authority. As regards the Council of the People's Commissars Article 37 of the Constitution declares that its function is the general administration of the republic. Of this triad the Central Executive Committee is responsible to the Congress of the Soviets, whereas the Council of the People's Commissars is appointed by the Central Executive Committee. However, Article 30 speaks of the Central Executive Committee also as a substitutive organ: it exercises the supreme powers of the Soviet Congress during the intervals between its sessions. Consequently in Article 49 of the Constitution the sphere of powers of the Congress of the Soviet and that of the Central Executive Committee are jointly defined (except for two matters, viz. (a) the definition, supplementation and amendment of the principles of the Constitution, and (b) the ratification of peace treaties, which were assigned to the exclusive sphere of authority of Congress).

Hence in the sphere of authority of the Congress of Soviets and the Central Executive Committee three intertwining levels may be distin-

guished, viz. the authority is (i) unrestricted following from the principle of popular sovereignty; (ii) express, following from the fact that, according to the enumeration of Article 49 of the Constitution, it cannot be absorbed by any other soviet agency even if these two agencies fail to make use of it; and (iii) the authority of the Congress of the Soviets is exclusive (Article 50).

This division was characteristic not only of the Soviet Russian Constitution of 1918 alone. It held for almost all socialist statutes settling constitutional or jurisdictional questions, when the statutes dealt with the issues of the supreme governmental organization. In fact it cannot even be otherwise, for any absolute restriction of the rights would eventually entail the limitation of the principle of popular sovereignty and so a violation of this principle. On the other hand the drafters of the Constitution could not dispense with a definition of the scopes of authority, at least of those of a regulatory and guiding character (and in a limited number of those of the exclusive type), for in want of such a definition spontaneous and irregular forms of the exercise of authority might develop.

As regards the Central Executive Committee, the Constitution defined the functions relevant to the Committee in all their details (i.e. functions which it performed in a non-substitutive capacity). The own authority of the Central Executive Committee was by far more general than the joint authority of the Congress of Soviets and of the Executive Committee, since the limitations of its functions were most blurred towards the administrative agencies. All this is attributable to the fact that for practical purposes the Executive Committee was the general guiding authority of state activities. The unsettled character of the limitations of this authority in the Constitution was obvious at the first glance, so Article 41 of the Constitution wanted to mitigate this want of clarity in a rather interesting and instructive manner, by enjoining on the Council of the People's Commissars to submit all its policy-making decisions to the Central Executive Committee for supervision and approval.

In its Chapter III the Constitution of 1918 also defined the agencies of the local soviets and their sphere of functions. This fundamental law in fact recognized and so did all Soviet constitutions until 1936, in conformity with the system of indirect elections, two types of the local soviet agencies, viz. the congresses of the soviets (in the regi-

ons, *oblasts*, in the districts, *uyesds*, and in the divisions, *volosts*) and the soviets of deputies (in the municipalities and rural settlements, i.e. villages, communities, the settlements of the Cossacks, market towns, small towns, *auls*, *hutors*, etc.). It should be remembered that, according to a note attached to Article 57 of the Constitution, in rural settlements where this was possible it was not necessary to assemble a soviet. The general meeting, i.e. the assemblies of the constituents could decide in matters of 'administration'.

Articles 56 and 60 of the Constitution declared that within the limitations of authority vested in it the local congresses of the soviets (territorial, regional, district and divisional) and the soviets of deputies were the carriers of supreme authority within the boundaries of the given territory. The same rights were conferred also on the general meetings referred to above. In the intervals between their sessions the executive committees acted for the congress of the soviets. Executive committees as agencies in charge of current affairs were organized not only at the congresses, but also at the soviets of deputies. Executive committees were elected by the corresponding congresses of the soviets, or by the soviets of deputies, as the case might be.

Disputes of competences with regard to the soviets and the local congresses of the soviets were settled by the Constitution in the same way as was done for the Central Executive Committee, i.e. it defined functions without drawing a line between a soviet agency of a definite stage and another. The functions were summed up as follows: (a) the enforcement of the provisions of superior soviet agencies; (b) in the cultural and economic sphere the use of all means for the development of the territory under the jurisdiction of the soviet in question; (c) settlement of purely local matters; (d) consolidation of all soviet activities within the given territory (Article 61). In addition, Article 62 of the Constitution conferred on the congresses of soviets and their executive committees functions of supervision over local soviets.

In addition to the above agencies, there were departments organized alongside of the executive committees of the municipal and communal soviets, further the territorial, regional, district and divisional executive committees for facilitating execution. Each department was headed by a chief (unipersonal leadership). The local soviet organization took the following shape: soviet of deputies—executive committee (void of substitutive functions)—departments alongside of

the soviet; in larger territorial units the congress of soviets—executive committee (with substitutive functions)—departments alongside of the executive committee. No provisions were taken up in the Constitution for a delimitation of the respective competencies of these agencies.

Another item in the group of problems of the system of soviets is the problem of election and recall. The provisions governing the franchise in the Constitution of 1918 excluded from both suffrage and eligibility members of the exploiting classes, and introduced the indirect system of election.[18] From other sections of the Constitution it is clear that the franchise was unequal, because territorial units predominantly inhabited by workers had a larger representation in the congresses of the soviets of higher order than had other territories. All this was in line with the exigencies and needs of the class warfare at that time. A peculiarity of the soviet system of the franchise at that time was the extremely short duration of the mandate of the deputies. The mandate of the soviets of deputies was for three months only, which meant that the composition of the congresses of soviets of a higher order created by way of indirect elections changed at very short intervals. What the soviet power had wanted to achieve by this had been a better reflection of the quick and rather sensitive changes in the political opinion of the population by the soviet agencies. Later this short term of the mandates was extended at the rate of consolidation of the general political situation.

The Constitution maintained the institution of recall by declaring that the constituents had the right to recall their deputies from the soviet at any time and to call new elections in conformity with the franchise rules. There were no detailed provisions in the Constitution on the method of recall. In fact it was a question that the meetings of the constituents could easily solve, and since election differed by territorial units or manufacturing plants, a uniform regulation of recall was out of question.

Furthermore it was a characteristic feature of the Constitution of 1918 that, besides the agencies already mentioned, there was not a single word in it of other governmental agencies or types of them. So, e.g., the Constitution had not a word to say of the judiciary.

[18] See Articles 64 and 65 of the Constitution.

Incidentally it was the Decree of the 7th December, 1917 which brought under regulation the judiciary.[19]

In the wake of the Soviet Russian Constitution of 1918 a number of temporary, transitory institutions cropped up during the Civil War, as demanded by the conditions of that period. Such institutions were among others the committees of poor peasants, which in a temporary capacity operated instead of the rural soviets, in the first place entrusted with the dictatorship of food provision. In the centre there was the Worker–Peasant Council of Defence which had full powers in the organization of defence, further the military administrative organs, etc. However, these organs were expressly of a transient,

[19] The provisional constitution of the Hungarian Republic of Councils (April 3, 1919) and later the definitive form of the Constitution (June 23, 1919), were worded on the principles of the Soviet Russian Constitution of 1918. Beyond a historical significance these constitutions had no influence whatever on other socialist constitutions as far as the structure of the state organism was concerned. The constitutional charters failed to provide accurate definitions of each governmental organ. The provisional constitution spoke of the most important sections of the state organism, viz. the national assembly of the councils of the workers, soldiers and agricultural labourers (exercising supreme power), the local councils (rural, municipal, district, regional) and their executive committees (for the direct administrative tasks). Sec. 3 declared that "the dictatorship of the Hungarian proletariat is exercised by the national assembly of the councils in association with the local councils of workers, soldiers, and agricultural labourers." The Constitution of the 23rd June (Sec. 4) mentioned the Revolutionary Governing Council. Capitalists and other hostile elements were disfranchised; elections were indirect and were not based on the equal franchise. The constitution defined the following sections of the governmental system: the National Assembly of the Federated Councils (the holder of sovereignty; Sec. 16 enumerated part of the 'highly important affairs of the State' within its competence in eighteen points, and as exclusive competence of the Assembly mentioned the formulation of the constitutional charter and its amendment, declaration of war and the signature of the peace treaties, and the delimitation of the frontiers of the country); the Federal Central Executive Committee (supreme authority of the country between the sessions of the National Assembly; in conformity with Sec. 20 the Committee exercised the supreme legislative, executive, and judicial powers); the Governing Council; the people's commissariats; the National Economic Council; the local councils (rural, municipal, urban district, district, regional, county) and their executive committees. The organs of the judiciary were organized by virtue of the decrees of the Revolutionary Governing Council (Decree IV—revolutionary tribunals, Decree CXV—National Revolutionary Court Martial, Decree CXXIV—tribunals proceeding in petty offences, and Decree XVXIII—labour courts).

temporary character. With the cessation of the causes responsible for their creation they were wound up. As for organization, the system as outlined above was soon completed by way of decree with the competence of the Presidium of the Central Executive Committee. (The Presidium conducted the meetings of the Central Executive Committee, it prepared the agenda of these meetings, drafted decrees, it supervised the enforcement of the statutes, performed guiding functions at the central and local agencies, decided on applications for pardon, and in matters of distinctions.)

Between February 1919 and December 1922 seven new soviet constitutions came into existence (on February 3, 1919 the Byelorussian; on March 10–14 the Ukranian; on May 19, 1921 that of Azerbaidzhan; on February 2, 1922 the Armenian; on February 28, 1922 the Georgian: on August 18, 1922 the Bucharan, on December 13, 1922 the Transcaucasian). As regards the governmental organization, all these new fundamental laws were formulated on the Soviet Russian pattern.

Mention ought to be made of a rather important provision promulgated by the Seventh Congress of the Soviets of the Russian Socialist Federal Soviet Republic on soviet construction.[20] Although this decree in the first place contained organizational measures going into detail, still a few rather interesting provisions of principle, characteristic of the soviet organization of that period appeared in it. For example, according to Chapter IV, the soviet deputies had to render account to their constituents at least fortnightly, on the penalty of forfeiting their mandates for twice neglecting this duty.

An essential change took place in the organization of the Soviet State with the formation of the Soviet Union, i.e. the Union of the Socialist Soviet Republics, the signature of the Union Act and its confirmation on December 30, 1922. This was followed by a series of decrees and statutes on the governmental organs of the federation, so in the first place on the Central Executive Committee of the USSR, which was composed of two houses, the Federal Soviet and the Soviet of Nationalities (November 12, 1923).

As far as the governmental organization was concerned there was little new in the All-Union Constitution of 1924. In fact this Constitution of the Soviet Union settled matters only forthcoming from the fede-

[20] Decree of the 9th December, 1919.

ral character of the State. The system of local agencies was ignored in it. This latter group of problems was specially dealt with in the constitutions of some of the union states (the Ukranian, Russian, Turkman, Byelorussian and Uzbeg).

The Constitution of 1924 defined the central governmental organs as follows: it called the Congress of the Soviet of the Soviet Union the supreme sovereign organ of the USSR. The function of the Central Executive Committee between the sessions of the Congress of the Soviet remained unchanged. The Presidium of the Central Executive Committee was made the supreme legislative, executive and dispositive organ for the period between two sessions of the Central Executive Committee, whereas the Council of the People's Commissars was made the executive and dispositive agency of the Central Executive Committee. The terminology and the very few definitions do not in fact permit an accurate delimitation of the scopes of these four central organs. This would be difficult also for the very reason that it is impossible to define the competences with any pretence to accuracy. Nor were there any limits drawn in the legislation. In this period, until the introduction of the Constitution of 1936, the soviet constitutional law ignored both the institution and the principle of a monopoly of legislation. In the governmental mechanism of the Soviet Union legislative powers were in fact vested, in addition to the Congress of the Soviets, in the Central Executive Committee, and in its Presidium, the Council of the People's Commissars, in the commissariats of the people, and even in the Council of Labour and Defence. To this we may add that in the union republics, similarly, a whole series of agencies were endowed with legislative powers, so the Congress of the Soviets of the Union Republic, the Central Executive Committee and its Presidium, the Council of the People's Commissars. All this explains the want of clear-cut lines keeping the scope of authority of the one agency apart from that of another, and at the same time solving of the unsettled character of this authority. However, it should be remembered that the principal problem of the Constitution of 1924 was federation, and so the division of the scopes of authority and jurisdiction between the all-union power and the union republics became the main concern of the drafters of the Constitution. The goal was achieved by the Constitution of 1924 by defining the All-Union scope of authority and jurisdiction in Article 1.

As regards the constitutions of the union republics these established the same system of central agencies of the republic as the Constitution introduced in the Union itself. Even their definitions in the respective constitutions conformed to that of the Constitution of the Soviet Union (e.g. Article 24 of the constitution of the Russian Federation and Article 27 of the Constitution of the Turkman Soviet Socialist Republic define the Central Executive Committee as the supreme legislative, dispositive and supervisory organ).[21]

As has already been mentioned the All-Union Constitution of 1924 did not touch the system of the local agencies. The organizational problems and matters of competence of the local soviets and congresses of soviets, further of their executive committees and presidiums were settled by the constitutional provisions of the union republics. The period from 1925 till 1931, i.e. the period in which these fundamental statutes were introduced, can in general be described as one of a high degree of approximation of the forms of the local agencies of the union republics. Consequently, the constitutions of the period incorporated several measures of marked similarity to which further were to accede after the introduction of the Soviet Constitution of 1936. It was only after the 20th Congress of the Communist Party of the USSR that greater freedom was allowed to local or national traits, and that increased attention was given to local exigencies.

The Ukranian constitution of 1925 defined the regional congresses, their executive committees, and the soviets of the delegates of workers, peasants and Red Army men (in towns, urban settlements, manufacturing plants, mines and railway settlements and villages) as the local organs of the soviet power (Article 49), and decreed that between two sessions of the executive committee its presidium should act as deputy (Article 55). The operating period or term of the soviets was raised to one year, i.e. in comparison with the earlier the office term was increased considerably. As regards the regional congresses of the soviets the constitution in a rather remarkable manner provided that the delegates of all soviets operating within the jurisdiction of

[21] Here the following constitutions are meant: the Transcaucasian of the 14th April, 1925; the Ukranian of the 10th May, 1925; the Russian Soviet Federated of the 1st May, 1925; the Turkman of the 30th March, 1927; the Byelorussian of the 11th April, 1927; the Uzbeg of the 28th February, 1931.

the congress had a right to appear (Article 50). The constitution further decreed the obligation of the delegates to render account to their constituents and the right of the constituents to recall the delegates (Article 62).

The Ukranian constitution brought the competences of the local agencies under regulation on new considerations. The constitution again failed to define the competences of the agencies, still, it enumerated the scope of activities of the local organs in detail. These were (a) in the economic and cultural sphere the definition of the methods of development; (b) the local budget and its approval; (c) enforcement of the provisions of the corresponding higher authoritative organs; (d) settlement of matters of local importance; (e) consolidation of the activities of the soviets and supervision of the operations of all state and social organs in the territory of the jurisdiction; (f) guaranteeing the revolutionary legality and the maintenance of state and social discipline; (g) ensurance of the co-operation between the trade union, co-operative, farmers', etc. organs; and (h) discussion of questions concerning the State as a whole at own initiative, or at that of the superior organs.

The Constitution of the Russian Federation of 1925 settled the problems of local organs and their competences in a manner similar to the Ukranian. In all matters of importance the constitutions of the Turkman, Byelorussian and Uzbeg union republics were in complete agreement with the Ukranian constitution.

Nevertheless, there were a few differences worth mentioning. The Byelorussian constitution in addition to matters of cultural and economic construction referred administrative functions also to the competence of the local agencies (Article 54a). The Uzbeg constitution, created much later, in the period of collectivization, reshuffled the scope of activites and functions. In accordance with the needs of the period it laid special stress on revolutionary legality, the maintenance of the class line in the activities of the state and local organs, the organization of the working masses for the performance of governmental functions, the suppression and liquidation of the capitalist elements and of the *kulaks*, the enlistment of the masses in state administration and for the fight against bureaucratic methods, the enforcement of the soviet policy towards the nationalities, and the strengthening of the defence forces. Obviously this enumeration made the soviets acquaint-

ed with political problems calling for direct action. Here too a delimitation of the competences had been omitted. Nor had provisions governing competence been taken up in the coeval statutes regulating the congresses of the soviets.

Although the All-Union Constitution made no mention of the local soviets and referred all constitutional regulations in connexion with them to the constitutions of the union republics, it was nevertheless exactly on an all-union level that legislation dealt with the soviets of different grades, the congresses of the soviets, and the executive committees. So the Presidium of the Central Executive Committee of the Soviet Union promulgated a decree on the municipal soviets on February 8, 1928 and on the communal soviets, on February 3, 1930. The Central Executive Committee and the Council of the People's Commissars issued a decree on the regional congresses of the soviets and the executive committees on October 13, 1930. Article 10 of the decree defined the municipal soviets as the supreme authorities of the given territorial unit. The plenum was made the governing organ of the municipal soviet (decisions on fundamental economic and administrative questions, so on the budget, were referred to the competence of the plenum). The presidium was made the executive agency of the municipal soviet. Organs for the enlistment of the co-operation of the masses were the sections and the committees. The executive committees performed their functions in subordination to the plenum.

The provision on the communal soviets made the latter the supreme authority of the territorial unit and defined it as the communal organ of the dictatorship of the proletariat. For an expansion of the mass relations sections and groups of the poor peasantry had to be organized. The decree on the regional congresses of the soviets went beyond the statutory provisions named above insofar as it contained detailed provisions on the executive committees. The executive committees were made the supreme power organs between two sessions of the congress of the soviets. The deputizing agency of the executive committee was the presidium. The competence of the executive committee was detailed in more than seventy paragraphs in spheres such as planning and statistics, agriculture, trade and industry, communal trade and transport, finances, social and cultural matters, labour and national defence.

All these provisions and regulations were closely associated with the action of the Bolshevik Party for the revival of the activities of the soviets. The joint plenum of July 1926 of the Central Committee of the All-Russian Communist (Bolshevik) Party and the Central Control Commission dealt for the first time in detail with this problem by calling forth the attention of the party members and the soviets to the importance of an enlistment of the toiling masses.[22] The same question came up for discussion in the plenum of the Communist Party of February 1927,[23] then in the joint session of the Central Committee and the Central Control Commission of the Party in December 1930, where the Party in particular insisted on the expansion of proletarian democratism.[24]

Before 1936 the statutes divided and defined the system of the soviet organization, which is of interest in the present discussion, as follows: the supreme organ of state power in the Soviet Union was the Congress of the Soviet of the USSR. The supreme legislative, executive and dispositive organ was the Central Executive Committee. The executive and dispositive organ of the Central Executive Committee was the Council of the People's Commissars. Among the local agencies the supreme authority was held by the plenum of the soviet, or the congress of soviets. The executive organ was the presidium of the soviet or its executive committee. The organs of mass relations of the soviets were the sections or the committees. Obviously very little was done in the line of the clear-cut differentiation of the various organs. In this period the opinions of soviet constitutional law on the unity of state power tended to retard a precise delimitation of the respective competences of the particular organs, for in this way, especially in the class warfare in the countryside, a chance was provided to the higher organs to take charge of certain functions also of the lower grades. Notwithstanding the fact that the slogans on a revival of the soviets voiced the development of the democratism of the soviet agencies of the lower grades, admittedly, at certain phases a vigorous

[22] Cf. Resolutions of the Congresses in *Коммунистическая Партия Советского Союза, В Резолюциях и Решениях Съездов, Конференций и Пленумов ЦК*, Часть II, Государственное Издательство Политической Лутературы, Москва 1963, стр. 150–60.

[23] *Ibid.*, pp. 235–7.

[24] *Ibid.*, Part III, Moscow 1954, p. 93.

centralization was called for, simultaneously with the growing acuteness of the class warfare. This was manifest in particular at the beginning of the thirties, in the settlement of matters of organization and competence.

4. SYSTEM OF THE SOVIET STATE ORGANISM SINCE THE INTRODUCTION OF THE CONSTITUTION OF 1936

The Soviet Constitution of 1936 has remodelled the Soviet government system on entirely new patterns. For the purpose of the present discussion the tremendous change entailed by the extension of the franchise will have to be ignored here, still, the fact that the abolition of the indirect method by itself has brought about radical changes in the state organism, needs mentioning. From this time onwards the Soviet mechanism has ceased to be a series of interlocked organs built up from bottom to top, and has become a uniform concatenation of organs with their composition directly reflecting the will of the population. Since indirectness by this way has ceased to exist, no distinguishing line can be drawn in the structure of the Soviet agencies of lowest grade, i.e., communal and municipal, and those of the medium and supreme grades. One may say that after the introduction of the 1936 Constitution a uniform organizational pattern was taking shape in the construction of the system of Soviets as a whole. However, this is not the main mark distinguishing the Constitution of 1936 from the earlier Soviet constitutions.

While the October Decrees of 1917, then the Constitution of 1918, and the All-Union Fundamental Statute of 1924 (in conjunction with the provisions governing details and the constitutions of the union republics) had given only slight functional differentiations of the Soviet organs operating on the same level and had been content with establishing the methods of practical substitution, routine operations and execution, the Constitution of 1936 set out from the policy-making principle of a division of labour by functions. It tried to localize the most vital functions emerging in the course of governmental activities within the particular areas of definite organs. It was on this ground then that the fundamental statute defined the particular sections of the organization.

The Constitution of 1936 relied on a quadripartition of the state

organization, viz. the organs of state power (supreme and local), the administrative organs (supreme and local), the judiciary and the procurators' offices. On the latter two it is sufficient to mention, for the time being, that these had turned up already in some of the earlier constitutions or in amendments of constitutions, and their functions, i.e., the administration of justice and the supervision of the observance of socialist legality had been, for a long time already, separated from other functions by statute.

As regards the two organs mentioned first, the new constitutional provisions created an entirely new situation. Even the organizational division itself is new. As has already been made clear there had been no examples for a separation of such permanent and firm character in earlier constitutions and statutory provisions as in these. In the beginning the statutes had described all local agencies summarily as administrative agencies. After 1936, in comparison with earlier practice, new types and functions could be discovered in this field.

In fact, the term 'organ of state power' (*organ gosudarstvennoi vlasti*) itself is a novelty. Although a similar expression (organ of power) had occurred in certain instances also in other fundamental laws, still this term did not delimit a type of organ endowed with definite functions. Essentially, the term had been used as a summarizing epithet of the organs carrying power and exercising it. In any case this term had not been confronted with that of the executive-dispositive administrative mechanism. The turn came now for a separation of the agencies of state power from those of public administration. Separated from each other, the two types of organism continued to perform their functions in an organizational association. The organizational pattern of the Constitution of 1936 at first glance resembles the Montesquieuian triad (completed with the apparatus of the procurators), but the two kinds of pattern differ from each other in exactly the most important aspect, namely in that of 'balance', and in this respect they stand in keenest opposition to each other. In the pattern of the Constitution of 1936 the elected organ, the one called organ of state power, occupies a position on the summit of the governmental organization, whereas all other agencies operate in subordination to the one or the other section of the organ of state power which sections are created—directly or indirectly—by the organs of state power.

In the pattern of the Montesquieuian triad, the summit position of the legislative organ does not exist. In conformity with the Constitution of the Soviet Union of 1936 the organs of state power are at the same time representative bodies, expressing the sovereignty of the people. The representative system comes into being through elections. On the other hand the public administrative agencies belong to the 'non-state-power' agencies, which are never elected by the population directly. Although in the field of public administration indirect elections are conceivable, still the usual method is to assign the respective functions to these agencies by way of appointment. The Constitution has essentially reformed the legislative power. While earlier the legislative functions had been exercised by so to say the whole central organization, now the Constitution (Article 32) restricted the right of legislation to the supreme organ of state power, viz. the Supreme Soviet. This is also a sign of the constitutional principle of delimitation or separation of the competences.

As regards the structure of the organs of state power this is defined by the Constitution in an extremely clear form. In conformity with the federal structure, in each state (all-union, union republic, autonomous republic) the supreme soviets operate as supreme representative organs of state power. As is known, the origins of the federation in the Soviet Union are contractual, for the agreement of 1922 also settled the division of the exercise of sovereignty. The limits of the competences of the supreme soviets, i.e., the supreme soviets of the Soviet Union and of the union republics had been in their essential traits drawn along the lines laid down in the 1922 agreement, although in the 1950ies, in conformity with the ideas of Lenin, the rights of the union republics were extended. Today the division of competences between the Soviet Union and the union republics relies on the 1936 Constitution. This turn has been called into life by the supreme All-Union organ of state power as its own Act. Following from this, the line drawn by the Constitution is the manifestation of will of the All-Union Supreme Soviet.

The structure of the supreme soviets as is laid down in the 1936 Constitution is not a uniform one; the federal, All-Union Supreme Soviet, is composed of two chambers (the Federal Soviet and the Soviet of the Nationalities, both having equal rights), whereas those of the union and autonomous republics are organized on the uni-

cameral system. There is uniformity in other respects, namely on the line of the substitutive agencies.

The presidiums of the supreme soviets as substitutive organs function at each stage. The 1936 Constitution sets limits to substitution: the Soviet Constitution does not recognize a general substitutive competence, unlike the Hungarian Constitution. (For the sake of a complete picture it should be noted here that the administrative section of the central government organization, the supreme organ of the state administration is—on both an All-Union level and that of the union and autonomous republics—the council of ministers, originally of the people's commissars.)

The Soviet Constitution of 1936 incorporates but few provisions only on the separation of competences among the various agencies. It chiefly defines the functions only as far as the presidium and the council of ministers are concerned (the assignment of a relatively large number of competences to the presidium is worth mentioning). In conformity with the Constitution, the competences of the federation, enumerated in Article 14, are assigned in general to the competence of the Supreme Soviet of the USSR, provided that—also in conformity with the Constitution—they do not come within the competences of the presidium, the council of ministers (originally of the people's commissars), or a government department (originally a people's commissariat). Such a delimitation of the competences is far from being perfect, as by this the assignment, e.g., of the objects of legislation, or, of the issuing of decrees (*ukases*, etc.) to the competence of a particular agency has not taken place.[25]

Unlike the All-Union Constitution of 1924, the fundamental law of 1936 embodied the principal problems of local organization. Owing to the introduction of the system of direct elections, the differentiation among the local soviet agencies has been done away with, as on all levels the elected agencies of state power are called *soviets*.[26] Article 94 of this Constitution defines the soviets as organs of state power of a given territorial unit (frontier region, region, autonomous region, district, section, town, and rural community). So in its terminology this Constitution departs from that of earlier constitution-

[25] Andrei Y. Vyshinsky in *The Law of the Soviet State* (New York 1951, p. 311) does not go beyond a definition of the competences.

[26] The designation Soviet Congress was abolished.

al provisions, the formula being 'supreme organ of power of the given territory'. The new definition is reassuring and eliminates misunderstandings. Incidentally, this Constitution had to abstain from a settlement of the competences of the particular soviets of the workers' deputies, for the very reason that it dealt with the questions of the local soviets of all grades in general in Article 8. The functions of the soviets are defined in Article 97 as follows: they conduct activities of administrative organs subordinate to them, safeguard political order; ensure observance of the law and rights of the citizens; conduct the constructing of local economic and cultural schemes; establish the local budget. By this the 1936 Constitution in fact defines the functions associating with the local soviets without, however, separating the various competences.

In each state-territorial unit the executive-dispositive agencies of the soviets of the workers' deputies are the executive committees. The general substitutive competence has disappeared from the competence of the executive committees. So the 1936 Constitution did not enumerate the executive committees among the representative agencies of state power. Vyshinski emphasized this new trait, pointing out that the executive committees could be considered local organs of public administration.[27]

On the other hand a permanent, codified division of the competences had been omitted from the 1936 Constitution. Only statutory provisions of detail include rules of competence, and even them only in a rather scattered form. No comprehensive codifications were formulated in 1936 for the various levels, nor have such been given ever since. In recent years several suggestions have been made by writers on constitutional law that a comprehensive codification of the competences should be elaborated, and it appears that the need for an introduction of such a codification has been recognized generally.

[27] A. Y. Vyshinsky, *Op. cit.*, p. 490.—It should be noted here that the Regulation of the Russian Federation of 1957 on the rural soviets recognizes certain competences. (See Sec. 35 which delegated all matters of constructing cultural, political and economic schemes, transferred by its soviet or superior government organ to the rural soviet, to the competency of the executive committee, except for the exclusive competences, i.e. approval of the account rendered on the local plans of cultural welfare and the confirmation of the leaders of the subordinate cultural-educational institutions.)

The Constitution of 1936 has created the following government organization. (i) Central organs (supreme organs in the Union, union republics and autonomous republics): the organs of state (representative) power (the Supreme Soviet and its Presidium) and the administrative agencies (the Council of the People's Commissars, later ministers), the people's commissariats (later ministries). (ii) The local organs: organs of state (representative) power (the soviets of the workers' deputies), and the public administrative organs (the executive committees of the soviets of the workers' deputies).

It should be noted here that mainly in the 1960ies considerable changes took place in the representative agencies of the Soviet State.

As for the new socialist states, the people's democracies, when shaping their representative organs after the Second World War they used the Soviet Constitution of 1936 as their model. Then, from the 1950ies onwards, more and more socialist countries began to form organizations departing from the model on both national and local levels. (These centrifugal tendencies have become responsible for a multiplicity of experiments defying an attempt at a comprehensive description. So these experiments will be discussed when the particular institutions are treated, in the first place in regard to the constitutional organizations of European socialist countries.)

5. REPRESENTATIVE ORGANS OF THE STATE AND PRINCIPLES OF THEIR COMPETENCE

In the socialist countries each of the four types of state organs established in the constitution (organs of state power, administrative organs, the judiciary, and the procurators' offices) exercises power activities, in fact each of them disposes of the power, or authority, the working people has conferred on it. When we analyze the specific types of these organs, the statement may be made that each of them exercises authoritative acts, i.e., each of them is an organ of power. It is beyond doubt that anyone e.g. of the administrative organs within the scope of its competency exercises authority. Similarly, the judiciary in its judgement, when in the name e.g. of the Hungarian People's Republic it decides the lawsuit in favour of either party, or punishes a criminal act, it performs an authoritative act. From this point of view there is

no difference between the organs called in the constitutions those of the state power and the other organs performing power activities.[28]

Still, there is a significant difference between the National Assembly and the councils, called in the constitution organs of state power, and any other power organs. The former are representative organs elected by the direct vote of the workers, and are the direct expression of popular sovereignty, the embodiments of the rights arising therefrom. This fact would by itself suffice to consider these organs most significant organs of the socialist State. In the case of the representative organs it must be emphasized that these are created by the citizens in order to represent their will, and that not all organs created by a direct vote are necessarily representative organs; in the Soviet Union, e.g., there are elected judges, etc.

Among the various types of organs in general a technical division of labour has been brought about. If it remains to find the distinctive marks on which this technical division of labour relies, it can be stated there is no doubt whatever that the basis for the division of labour is clear and well-defined in the judiciary, whose function is the application of the law, the administration of justice; or in the procurator's offices, where the supervision of the observance of socialist legality in the various governmental and other organs takes place. On the other hand the basis for the division of labour between the representative and the administrative organs is by no means so well defined and delimited. In this sphere a number of questions, mainly practical ones, emerge. So far the attempts at a delimitation have not even formally met the expectations. Of course the mere statement that legislation is the unalienable and unassignable competence of the supreme organ of state power, in itself means nothing. In this sphere the salient point is the actual content of the legislative Acts, and whether or not the National Assembly has an exclusive competence to reserve a group of problems or a definite subject-matter (e.g. the determination of taxation) for itself. It is not the constitutional form of the Acts that is decisive, but the function the representative or any other organ fulfils on the ground of the Act. And for that matter it

[28] The same position was taken by G. I. Petrov; cf. О понятии органа государственной власти в СССР (Notion of the organs of state power in the Soviet Union), published in Вестник Ленинградского университета, *Серия Экономики Философии и Права 1956*, No. 5, p. 81.

is a well known fact that in the organizational practice of recent years such exclusive functions could hardly be ascertained for the representative agencies, either in Hungary or in any other socialist country.

Let us analyze e.g. the Hungarian Constitution in this connexion. As is known, clause (4) Article 20 of the Constitution has reserved only the amendment of the Constitution for the exclusive competence of the National Assembly, unlike the Soviet Constitution of 1936 and the majority of the constitutions of the people's democracies, which have assigned a by far more extensive scope to the exclusive competence of the supreme organ.

By itself, this circumstance would present no serious problem; in fact theoretically the supreme representative organ can draw within its competence any question. When in the constitution this organ assigns authority to other organs, it in fact restricts its own scope of authority. It may proceed along this path when by a legislative Act it assigns further competences to organs of other types, to the administrative organs, to the judiciary, or to the procurators' offices. The supreme organ may even withdraw these rights, restrict or extend their scope at will. The problem is that practically often the line of demarcation between the supreme representative organ and the government—the supreme organ of public administration—becomes blurred. Let us take as an example the activities associated with the approval of the budget. It is obvious that preliminary statistical data and other statements associated with the budget have to be compiled by the organs of the public administration. It is also quite natural that the specialized agencies of fiscal administration have to co-operate in order that the budget might be compiled expertly, so as to satisfy all fiscal needs. Further, there is no doubt that, for reasons of governmental policy, the government has to take part in the preparatory work. However, so far the line could not be drawn where budgetary work, i.e. the actual preparation of the approval of the budget, has to be taken over by the legislature. And for that matter this line has even undergone a fairly large number of changes. Here we should like to mention merely that e.g. in recent years the National Assembly has taken control of the debates on the budget—if not in the plenary session so at least at the committees—at a far earlier stage than before. This tends to confirm that the position that the National Assembly

should discuss the estimates only when these are complete, is not necessarily correct. It seems much more expedient that the National Assembly should become acquainted through its various organs with the details of the budget already at the preparatory stage and, by an amendment of these provisions of detail, influence the content of the budget before its being tabled at the plenum. So it is hard to draw a line between the functions which have to be performed by the administrative agencies in this field and those which, in the strict sense of the term are acts of power.

If this is the case with the National Assembly occupying a position on the summit of the representative organs, it must be true to an even greater extent for the local agencies. For example, in Hungary Act I of 1950 still defined a few rights coming within the exclusive competence of the councils, such as approval of the local government budget and economic plan, the election of the members of the executive committee, the election of the permanent and temporary committees (Section 31 of the Act). However, Act X of 1954, mainly on theoretical considerations, omitted the earlier enumeration of the exclusive competences of the councils. Although from subsequent statutory provisions, and so also from the Councils Act it is evident that the election of the executive committee and the committees of the council remains within the competence of the councils even in the future, further, a number of governmental measures have charged the councils with the approval of the budget, it is nevertheless characteristic that Act X of 1954 did not even make an attempt to define the competence of the representative organ with any precision. The practice of the executive committees and of the specialized agencies of almost ten years demonstrated that the leaders of the administrative organs, so to say in each town and community, considered different functions as coming within the sphere of state power, and when the work of the councils livened up, a diversity of questions were brought forward in the council sessions.

Unless the experience gained so far is misleading, it will have to be said that no theoretical line can be drawn between the functions of the representative and the administrative organs, in particular when the latter are such of general competence. We can hardly pronounce of a specific function with absolute certainty that it comes within a purely representative, or purely administrative scope, and there is

very little hope that such a theoretical delimitation could be carried through in the future. This is what is inferred from historical experience and the testimony of socialist state structure. For want of absolute distinctive marks and a theoretical solution, the assignment of competences here has to be entrusted to the practice of state agencies.[29]

In all circumstances we should like to avoid the appearance as if this statement wanted to support the incorrect practice of a few years ago, when the state agencies withdrew almost all questions from the representative organs, so that they became entirely impotent and void of content. The goal set here is to enliven the activities of the representative organs. What is the underlying theory of this position? The representative organs, and so also their local organs, are the institutions of the socialist State expressing popular sovereignty. If such is the case, these organs have to be aware of all essential matters emerging in their sphere of competence, and it is these organs which will have to decide on the most important questions concerning the local population, i.e. they will have to perform an act of state power in the given case. The character of the territorial unit, the num-

[29] In the Czechoslovak literature on constitutional law, statements similar to this have appeared, though their principles adopted as starting points are other than those current in Hungarian literature. Keeping in mind the Leninist principle of a unity of legislation and execution, Czechoslovak literature takes the position that there is "no essential difference between the practice of the state power and the public administration" (cf. Karel Bertelmann, Eine neue Etappe in der Entwicklung der Nationalausschüsse der Tschechoslowakischen Sozialistischen Republik, *Staat und Recht* 1961, No. 2, p. 249), and therefore "the new constitution does not recognize the traditional partition line between legislation and execution" (cf. Pavel Levit, Les organes suprêmes de l'Etat dans la nouvelle Constitution, *Bulletin de Droit Tchécoslovaque* 1960, Nos 1–2, p. 70). Accordingly, the national committees are "uniform organs of dual competency . . . the bodies of autonomous administration . . . at the same time the united representatives of state power and public administration." (Cf. Zdeněk Jičínský, Les Comités Nationaux et la nouvelle Constitution de la République Socialiste Tchécoslovaque, *Ibid.* p. 87.) On this consideration the constitution itself speaks of the local organs (national committees) of state power and the public administration.—For our part we believe there are essential differences within the united organism of the socialist State between the weight and functions of the representative organs expressing the will of the working people and embodying sovereign rights, and those of the administrative organs.

ber of the population, further the circumstance whether it is an industrial population or a rural area, will determine what has to be considered a vital question from the point of view of the population, and also the potentialities of the council dealing with the most important problems of the territory. What may be of extreme importance in a rural community (e.g. the licensing of a manufacturing plant) may affect only a limited zone in an urban district. Obviously a problem of country planning will affect the whole population of a community. At the same time it would be illusory if the plenum of a county council discussed, e.g., questions of a slight correction of a territorial division, even in respect of two communities (provided this correction does not affect the boundary line of the county).

On this understanding all that has been set forth so far may be summed up in a sense that the functions to be performed by the local representative organs will have to be defined separately for each grade and type of settlement, i.e. the issues of a representative interest will have to be laid down. As a matter of course, for the smallest settlements a possibly extensive range of functions will have to be defined, whereas for larger territorial units, hereincluded the large municipalities, only the genuinely guiding functions will have to be reserved for the councils. It is not likely that the competences and rights of the particular councils can be defined once for all, however, it remains certain that in all circumstances a maximum of stability should be guaranteed in this field.

As has been made clear earlier, as far as the State is concerned, the technical division of labour is a constitutional matter. In this respect there appears to be no difference whether this division is carried through within the sphere of the central or of the local agencies. And when it is agreed that this problem is one coming within the scope of the constitution, then its settlement should in all circumstances be assigned to the competence of the legislature.

It would be beyond the point if all questions of competence were incorporated in the constitutional charter. A solution on this line would unreasonably and unnecessarily add to the demands set up to the constitution. As a matter of fact a constitutional charter should never be made a compilation of codes. Therefore in our opinion it would be the correct and satisfactory procedure when the problems of competence arising between the representative and administrative

agencies were settled by the National Assembly by way of a simple Act. Naturally the right of the National Assembly to amend or change its own legislative Acts whenever the need arises should remain intact. Hence the Act of the supreme representative organ would determine which of the rights come within the competence of the representative organs, and which one within that of the local organs of public administration, in other words, which functions belong to the representative and which ones to the administrative agencies.

As a matter of course the legislature will have to bear in mind that socialist democratism is the objective regularity of the socialist governmental organization. However, in this sphere regularity cannot be summed up in a single formula as is the case with the regularities of natural science. The basic principle of socialist democratism, as any non-natural law, represents a definite trend, i.e., it signifies that in the interests of the workers' State the toiling classes and strata of society, in the first place the workers, have to be drawn within the sphere of governmental activities in the process of constructing of socialism. That this is an objective law is borne out by the fact that when the principle of socialist democratism is jettisoned, it will result in an intensification of controversies within society and these controversies will grow into true antagonisms. Consequently, in the course of legislation (in the present instance of legislation purposing the delimitation of the competences of the representative and the administrative organs), the legislative organs will have to pay attention to the tendency which originates from this objective regularity of the construction of the State. We believe that for this reason a potential extension of the rights of the representative organs by the legislature—on the understanding of a primacy of such organs—deserves most thorough study, in particular when it comes to settle the competences of the councils of the lowest grade.

The representative organs are the most important organs of the socialist State, their competences are settled preferably by way of legislation by the representative agencies themselves, when the observance of the principles of socialist democratism, which under the socialist conditions of society amounts to an objective regularity, is mandatory.

6. STATUTORY DELEGATION OF THE COMPETENCES OF THE LOCAL REPRESENTATIVE ORGANS

Another important problem, both theoretical and practical, of the representative organs is the definition of the division of labour among the central (supreme), medium and low grade organs.

Since the collapse of the system of feudal disunity there are States in the world which no longer represent a loose association of small communities but, in order to satisfy the exigencies of the modern State, dispose of a centralized governmental system. In these States sovereignty is embodied by the different systems of the central organs and the rights arising from sovereignty are exercised by these organs. When this is the case, then irrespective of the Prussian *raison d'état* on which the theory of a delegation of power as developed by Laband and Jellinek relies as opposed to the French position of municipalism, we have to recognize that the local organs necessarily receive their powers from the central organs embodying sovereignty. These powers vary by States as to their character and extent. Still their origin is beyond doubt the same, viz. they are powers delegated by statute or by legal custom.

In the life of the soviet State peculiar new traits may be discovered. Originally the practice of the local soviets relied in the same way on the position of 'the republic of the soviets' as the draft constitution of Reisner. It was exactly Lenin who wanted to replace the term of 'the republic of the soviets' by the term 'soviet republic' as one expressing the centralism of the soviet State. It is true though that, as a result of the character of the revolution, at the birth of the soviet State certain local organs had an important role, and that their role lasted for months. However, on the ground of Lenin's principles of the organization of the State, the fight against these forms of disunity, and for a soundly centralized socialist State was taken up at an early stage. The Soviet Constitution of 1918 still reflected the effects of this fight. Article 10 of the Constitution declares that "in the territory of the Russian Socialist Federal Soviet Republic all power belongs to the working people organized in the municipal and rural soviets of the country". Articles 61 and 62 of the Constitution declared partly that the local soviets were bound to enforce the provisions of the superior organs of the soviet power, partly that the superior

soviet organs had the right to supervise the local soviets and to rescind the resolutions of the soviets subordinate to them.

From what has been set forth earlier it is evident that in the course of evolution of the soviet State also the position of the local soviets has changed and so did their relations to the superior governmental organs. There is no doubt that the changes have operated towards centralism.

Even when the highest sovereign-representative organs owed their existence to indirect elections, in a socialist State the fulness of power was, and is still, in the hands of the supreme representative organ. The reason is that this is the only organ which is created by the whole working people (through the Power Act of the Enfranchised), and which is therefore the representation of the working people as a whole. Clause (2) Article 10 of the Constitution of the Hungarian People's Republic expresses this by declaring that "the Parliament exercises all rights originating from popular sovereignty". Hence in Hungary the fact of the election confers the entirety of sovereignty on the National Assembly, i.e. the working people transfers its powers to the legislature.[30] This statement could be mitigated by declaring that only the exercise of sovereignty has been delegated by the workers, still this formulation involves no changes in the essence. Actually there is not a socialist country where, as a regular requirement, practice would insist on the supplementation of legislative activities by direct democratic Acts such as a plebiscite or referendum.

However, the working people creates not only the supreme representative organs, but also other representative organs. At the

[30] According to Clause 2, Article 15 of the Polish Constitution "the Seym exercises the rights of the sovereign people". — Article 20 of the new Mongolian Constitution declares that "the great Hural of the People exercises the fulness of the sovereign power." Where the constitution does not expressly include this principle, the writers on constitutional law confess to the supreme organ of state power being the expression of the complete sovereignty of the State in the given socialist country – cf. Gospodin Zhelev, *Народнойо Събрание — върховен оргдан на гържавната власт в Н. П. България* (The Popular Assembly as the supreme organ of state power of the Bulgarian People's Republic), Sofia 1960, p. 19; or to these organs being the direct representatives of popular sovereignty and that of the State, expressing the will of the people as a whole —. Ya. N. Umanski, *Советское государственное право* (Soviet constitutional law), Moscow 1959, p. 252.

polls also the local councils are elected. Admittedly, these do not anymore represent the working people as a whole, but only groups of it, living in territorial units organized by the territorial divisions of the State. Naturally councils as a whole are elected by the whole population, the whole electorate, still, the particular councils owe their existence to a fraction of the population only. This is the qualitative difference between the National Assembly and the local councils.

The workers delegate the exercise of all rights arising from sovereignty by the fact of election to the National Assembly, hence (a) elections create the supreme representative organ; (b) by the fact of election at the same time the exercise of all rights following from popular sovereignty are also transferred.

The situation is altogether different with the councils. The local population elects the councils. However, since the fulness of rights following from sovereignty have been conferred upon the National Assembly, a further Act of the state power will be needed which establishes the competence of the organs so created. In addition to the Act of election by the citizens, a legal statute by the superior governmental organs, in Hungary that of the National Assembly will be needed that the councils or other organs of public administration perform the functions which the Constitution of the Hungarian People's Republic expresses by declaring that the local council "directs the economic, social and cultural activities" (paragraph (a), clause (2) Article 31); Clause (1) Article 31 of the Constitution according to which "the local councils in the territory of their operation exercise their supreme power within the limitations defined by the constitutionally introduced legal rules and the superior organs" could not be construed otherwise.

Accordingly the local organs exercise all functions which the National Assembly and other central organs have relegated to them. Hence in our socialist state the power of the local organs is—undoubtedly— a delegated one.

The question may now be asked, whether on this understanding the central organs may relegate powers of optional extent and quality to the organs of medium and lower grades at a given time. It is beyond doubt that the supreme representative organ has to agree to a participation of the organs of a lower grade in the exercise of sovereignty so as to do justice to the given political situation. However, in this

case the political situation is understood in a wider sense. It is further natural that the political situation necessarily depends on the objective regularities which influence the whole life of the State.

In a socialist State the socialist democracy—i.e. democratism associated with centralism—has far better chances than democratism in any earlier State. It is indispensable that the organs positioned at the lower grade and in permanent contact with the population should receive the competence required for the performance of their functions. This demand comes into prominence when the socialist State has entered a relatively peaceful phase of its evolution. However, when the socialist State has to cope with various difficulties, economic or political, then the extent of delegation will become narrower than at the peaceful phases.

It is the task of constitutional law to establish the methods which at this phase of the evolution of the state permit an optimal division of labour and competences between the central organs on the one and the organs of medium and lower grades on the other part. It should be emphasized that in conformity with the foregoing—on purely theoretical considerations—statutory delegation of powers should be preferred.

Certain principles of the delegation of competences will have to be defined in a clear-cut manner. According to the most generally accepted position, sponsored in this work, (a) functions fulfilling the economic and cultural needs of the population; further (b) functions which on the whole are performed by the central organs, but which evoke a keen interest of the local population—which has to be consulted and even its aid enlisted for their performance— should preferably be delegated to the representative and administrative organs of the lower grades.

CHAPTER THREE

REPRESENTATIVE SYSTEM IN THE SOCIALIST STATE

1. FUNDAMENTAL PROBLEMS OF REPRESENTATIVE DEMOCRACY

Earlier, on outlining the pattern of a socialist governmental organism, it has been made clear that in a socialist State the organs of highest prominence are those of state power. These organs owe their significance in the first place to the fact that they are elected representative organs at all stages. Let us set aside for the time being the questions affecting, in relation with the councils or soviets, the intertwining of direct and indirect democracy and, before all, let us deal with the socialist content of representation and with the conclusions following herefrom. As a matter of fact, inasmuch as being an elected representative organ lends a specific significance, function, and position to the organs of state power in the mechanism of the State, the sphere of problems of the popular representative nature will have to be explored to its depth, and the content of this representation examined, namely, *whom* does the elected person or agency represent; how is the dictatorship of the working class, or the alliance of the working class with the other toiling classes and strata reflected by the representation. Further, the position of the representatives; that of the council members as individual representatives, and as members of the organ of state power; their relations to the electorate and their own agency; the potentialities and limitations of a 'mediatization'; and finally the weight and relations of the particular representative organs in respect to one another.

The system of the soviets—and so also the council system of the people's democracies relying on it—are the most appropriate form of a representative, indirect, democracy under socialist conditions, both centrally and locally. On the strength of historical evidence the soviet system stands for a continual expansion of popular representation, and surpassing this consistently radical, democratic trait,

the soviet system is becoming an ever more appropriate means for the enlistment of the population in governmental activites. The goal of evolution will be reached when the councils uniting with the trade unions, co-operatives and other mass organizations of the workers will become the organs of direct democracy, the self-government of the people. Lenin on several occasions called attention to the fact that the significance of the consistently democratic representative organs, i.e., of the socialist soviets, lay exactly in the fact that, beyond drawing the representatives into governmental activities, they constituted a chance of initiating the population in these activities in a like way.

When the representative character of the organs of state power is emphasized, the representative character has to be understood with the supplements referred to above. These are representative and, what is even more, popular representative organs that have been made by their form, in particular by the class content background, extremely suitable for the combination of the representative and direct democratic system, and then the evolution of the latter. It follows therefore that the existence and operation of the representation are the minimum of the operation of the organization of state power and merely means for the achievement of a social organization of a higher degree. At the same time we know that the dictatorship of the working class, i.e., the form of transition from capitalism to communism, is characteristic of the society led by the proletariat for a whole historical period. This long period develops an abundance of representative forms in the organization of state power that makes use of these forms for the political guidance of society and the consolidation of its alliance with the working classes. In the period of transition, the soviet form of representative democracy affords the maximum of democratism for the working people. A reinforcement of the representative character in the organs of state power, in both the superior and the local, is important. In fact it is not by chance, for subjective reasons that the constitution, this fundamental instrument of all socialist countries, declares the organs of state power are the guiding organs of the socialist State to which all other governmental organs are subordinate. It is because these organs reflect the will of the population, the working people, that they have grown in importance. In the course of election the will of the working people makes

its influence felt in the governmental organs called to life by voting. The consistency of the representative system in socialism, the influence of the working strata of the population, i.e. of its overwhelming majority, on the organs of state power, the subjection of the councils, and the supreme organs of state power, to the most radical demands of representative system, all these with objective regularity operate towards raising the representative organs, i.e. the mechanism expressing popular sovereignty, to the supreme leading position of the political organism.[1]

As expounded earlier, the socialist representative system differs considerably from bourgeois representation, even from its most democratic forms. There is a remarkable difference not only in that the 'evolution' of the bourgeois representative system may be described as a process of growing emasculation and limitation, whereas socialist representation expands on the line of popular self-government, or self-administration—but also in that socialist representation has already adopted a number of direct democratic institutions (here we may refer to the system of recall, the rural meetings, conferences, congresses, social guides, supervisors,[2] the system of imperative mandates, social activists, popular initiative of legislation,[3] etc.). It would be a distortion of the institution of socialist representation, if all these existing traits were ignored in a study of the organs of state power, the representative institutions. As will be shown, in the modern socialist State there is no genuine socialist democratism without a dependence on the electorate. This dependence, beyond doubt, goes with the established order of the instructions issued by the electorate, with the system of recall, etc.

[1] Essentially the same trend of thought may be discovered in Stefan Rozmaryn, *Sejm und Volksräte in der Volksrepublik Polen*, Warsaw 1958, p. 6.

[2] Cf. V. F. Kotok, A népképviselet és a közvetlen demokrácia kölcsönös kapcsolatának fejlődése a Szovjetunióban (Evolution of the mutual relationship of popular representation and direct democracy in the Soviet Union), *Jogtudományi Közlöny* 1961, No. 3, pp. 146–8.

[3] Cf. the review of Janusz Kolczyński's lecture "Zwierzchnictwo ludu a praworządność" (Popular sovereignty and legality) by Janina Zakrzewska in the study "Sesja naukowa we Wrocławiu poswięcona zagadnieniu zwierzchnictwa ludu w państwie socjalistycznym", (Wroclaw Symposium on popular sovereignty in the socialist countries), *Państwo i Prawo* 1959, No. 10, pp. 679–80.

2. CONTENT OF REPRESENTATION UNDER THE CONDITIONS OF THE DICTATORSHIP OF THE WORKING CLASS

Socialist representation is thus a form of indirect democracy which is increasingly completed with a series of direct democratic institutions, and which is absorbing these institutions, or part of them. When making this statement it has to be emphasized that socialist constitutional representation, in the first place embodied by the organs of state power, comes into being by way of elections. More precisely, since 1936, in each socialist State they are created by way of direct elections, irrespective of whether a national organ of state power, or a local government organ has to be elected.

The Act creating the representative institutions is a political Act, an Act of the franchise. In order to proceed to an analysis of the content of representation certain questions of the franchise will have to be studied from close quarters. In the first place let us ascertain, whose will is transferred to the representative organs by the Act of election. Or, with Rousseau, whose is the *volonté générale* finding expression in the course of election? Which class or classes manifest this general will?

It is a well-known fact that the Soviet Russian Constitution of 1918 and the Constitution of the Hungarian Republic of Councils of 1919 had introduced a system of suffrage which did not rely exclusively upon the territorial principle, but upon a mixed system of industrial and territorial representation. This system of the franchise, further the indirect elections (in these elections the municipal soviet organs were allowed a great influence on the creation of the superior organs) entailed the reinforcement of the representation of the working class in the representative agencies, in particular in the supreme agencies and in those operating in larger territorial units.[4] The Constitution of the Russian Federation of 1918 declared that in the soviet congresses the urban population should be represented by a member for each 25,000 voters, whereas the representation of the provinces (where the rural, peasant population had an overwhelming majority) was limited

[4] Cf. Sections 43 and 46 of the Constitution of the Hungarian Republic of Councils of 1919, which decreed the delegation of the municipal delegates to the district and county councils.

to a single member for a population of 125,000. i.e. numerically the working class was over-representated in comparison. In that period the above form of representation was correct and necessary. It was the period of the Civil War; under the conditions of an extremely acute class warfare the government could not rely in the same way on a wavering mid-layer as on the most consistent revolutionary class, the proletariat. So the system of the franchise in force before 1936 favoured a representation of the working class at a rate higher than this class represented in the population. The higher representation of the working class was at the same time the numeric expression of the leading role of this class. The political organization confirmed the predominant part of the working class in the exercise of popular sovereignty. However, as soon as the remnants of the exploiting classes disappeared not only in the towns, but also in the countryside, the so far most extensive mass organization, that of the organization of state power, of necessity transformed its mass background by expanding it. Consequently, since the introduction of the Constitution of 1936 inequality of vote ceased in the Soviet Union, and also indirect voting was abolished. Apart from rare exceptions, such as e.g. in Europe between 1952 and 1953 in the Rumanian Popular Republic, in Asia the People's Republic of China and the Mongolian People's Republic, there was no inequality of the franchise in the people's democracies. (Even in the countries here mentioned, merely the former exploiting elements were disfranchised.) This meant that in the socialist countries essentially the practice of increasing the political rights of the working class by an unequal franchise came to an end. The part of the population not expressly disfranchised (in the socialist states the cases of disfranchisement have been limited by the constitutions and the franchise laws to an extremely small number, and these essentially imply lunatics and persons deprived by judgement of their political rights) has taken and is taking part in the creation of the representative agencies by way of proportional suffrage.

Consequently the organs of state power have to be considered the proportional representation of the working classes and strata. On this understanding the organs of state power, supreme or local, cannot anymore be considered exclusively the organs of the working class. In fact these organs are in charge of the representation of the population as a whole and express the will of all workers (hereunder-

stood the workers active in the territory of competence of the organ in question).

However, the idea of a dictatorship of the working class is by no means in conflict with the inevitable fact that the organs of state power are the representative organs of the whole working population. Although in the socialist countries where the majority of the population is not constituted by the working class, it is in its majority the non-industrial population that takes part in the creation of representation, still the dictatorship of the working class is implemented even by the organs so created. There are several means which afford an aid to the achievement of this dictatorship. Here the effect and the growing influence of the Marxist–Leninist party have to be emphasized. By way of its influence, the pioneer troop of the working class, relying on the ideology of this class, guides political activity as a whole. Further it should be remembered that the non-worker strata of the population in large numbers elect worker delegates. Consequently from the class composition of the voters no direct conclusions can be drawn as to the class composition of those elected, of the delegates. As an outcome of this the weight of the working class is guaranteed in the representative organs of state power. The statement may therefore be ventured that there is no conflict whatever between the representative organs of state power, elected on the principle of universal and equal suffrage, and the dictatorship of the working class. Moreover, in the actual historical period central and local agencies of this type, under the guidance of the party of the working class, help to expand the mass support of the State and the working class. The question raised by Biskupski has to be qualified as false on some sort of an intrinsic controversy, the conflict of the will of the working class with that of the representatives of other classes within the representative organs. Biskupski seems to believe in a socialist political organization that could operate without the guidance of the working class.[5] There is no socialist representative organization or political mechanism which would not consider the will of the pioneering working class—most interested in the victory of socialism and therefore

[5] Cf. Kazimierz Biskupski, Niektóre problemy socjalisticznego parlamentaryzmu (Problems of socialist parliamentarism), *Państwo i Prawo 1956*, No. 10, pp. 545–66.

consciously carrying on the struggle—authoritative throughout its activities.

It is not a voting or two, or the passing of a few resolutions, which is characteristic of the activities of the socialist representative agencies of state power. If these accounted for the bulk of the activities of these agencies, they would differ in no way from the machinery of bourgeois parliamentarism, of activities directed by the lobbyists or pressure groups. In the Hungarian People's Republic the councils and the National Assembly, or in the other socialist states the corresponding central and local organs, are extremely important transpositions of the mechanism of the dictatorship of the working class, which are at the same time the forms of expression and the shapers of the will of the population. In order to strip the term of Rousseau of all its traits of no use for the present purpose, the statement has to be made that in the socialist State even when it is agreed that its formation is historically predetermined the will of the people does not come into being mechanically, of its own accord. In the socialist State the formation of the will of the population is largely dependent on political education and the exposition of the political ends. This education and exposition are the obligation and the right not only of the patently political institutions. In the socialist State the *volonté générale* is shaped by the permanent interaction between the needs of the population and the political means and methods explored by the party. Both in the expression of the needs, and in the exposition of the trends in political-social evolution as explored by the party, the representative organs of state power have so to say a key position. The lower a grade at which the organ of state power operates, the more directly and crudely the manifestation of the needs of the population will appear. At the same time the more imperative the performance of the functions associated with the education and with the development of political consciousness of the population will become.

Let us stop here for a moment. As has been explained in the previous chapter, the term organ or agency of state power occurring in socialist constitutions since 1936, calls for a notional completion. (In fact each governmental organ disposes of some sort of power, and what is even more, state power, i.e. it has an *imperium*.) It is correct to include the term representative in it. However, at the pres-

ent juncture attention should be called upon the risk implied in the use of the term 'representative organ or agency' by itself. In the strict sense of the term the representative system is but the transmission of the will of those represented. The traditional sense of representation signifies the unidirectional obligations and activities of the representative agencies: these agencies sum up the will of the population and express it in their normative Acts, whereas as has already been mentioned, in a socialist State the functions of the representative agencies cover more than this. The education and guiding of the people, moreover the enlistment of the population in governmental and social activities are equally important functions of these institutions. This is the reason why in Hungary and so also in other socialist countries the representative character is not the only characteristic mark of the National Assembly or of the local government councils.

On the other hand the term state power demonstrates that what is required from these organs is the performance of the functions that have been established since the 1936 Constitution, viz. the two-directional relations to the working people, the alignment of the population behind the working class, the cause of socialism, etc. Thus the use of the term state power indicates also the adherence to the traditions of the socialist construction of the State and not merely the association of these organs with such that dispose exclusively of the *imperium*. This is the reason why the joint use of both terms throws a light on the genuine and full functions of these organs. In the Soviet Union and in the majority of the people's democracies of Europe the two terms have become almost inseparable in jurisprudence.[6] (Article 78 of the Yugoslav Federal Constitution of 1963 calls the *skupshtinas*

[6] Cf. e.g. Ya. N. Umanski, *Советское государственное право* (Soviet Constitutional law), Moscow 1959, p. 232; A. H. Makhnenko (editor), *Государственное право стран народной демократии* (Constitutional law of the countries of people's democracy), Moscow 1959, pp. 97, 104 et ssq.; L. D. Voevodin, D. L. Zlatopolski and N. Ya. Kuprits, *Государственное право стран народной демократии* (Constitutional law of the countries of people's democracy), Moscow 1960, pp. 115 and 130; Beér, Kovács and Szamel, *Magyar államjog* (Hungarian constitutional law), Budapest 1960, p. 234; K F. Sheremet, Der XXIII Parteitag der KPdSU und die Entwicklung der Sowjets, *Staat und Recht* 1966/9, pp. 1442–8.

organs of state power — moreover supreme organs of state power — and self-governing social organs.)

As far as the representative organs of state power are concerned, the statement may be ventured that there is no conflict whatever between the principle and practice of the dictatorship of the proletariat and the universal, equal (proportional) suffrage. It should be noted that in the course of history, on a few occasions, the weight of the working class was increased in the socialist representative organs (reference to this has been made in connexion with the industrial constitutiencies established by the Soviet franchise law). The Polish electoral law of October 31, 1957 (whose effect extended to the people's councils only) so to say reverted to the earlier Soviet system of industrial and territorial constituencies, and in Section 15 formed two types of constituencies, viz. territorial constituencies and industrial constituencies. The latter are established in the municipalities, urban districts, districts, settlements (for the workers of industrial, building and transport enterprises of major importance, irrespective of their domicile). Despite this system no dual vote was conferred on the voters of the industrial constituencies; the purpose of the institution was merely to create uniform industrial workers' constituencies, which later on could become originators of political activities on a higher scale. The purpose of the state was to concentrate certain forces of the working class. Undoubtedly the Franchise Act threw out the idea of the institution of industrial constituencies merely in an experimental form. This was borne out by the fact that in the course of the first elections called after the promulgation of the Act, only a small number of industrial constituencies were organized by the competent organs (the State Council, and the people's councils of higher order). Eventually, in 1961, the industrial constituencies were abolished. On the other hand the Yugoslav constitutional law adheres to the system of dual representation, viz. the general (non-discriminative) representation of the citizens and representation by communities of work (cf. Articles 76 and 165 of the Federal Constitution). — It can be inferred here that such and similar experiments correct the universal and equal (proportional) representation so well established in the socialist States slightly only.

The general system of representation may, however, be affected by two problems of suffrage (both of which are nowadays a rare

occurrence), viz. the possible survival of the multi-party system and the principle of indirect elections established in the constitution of the given State.

Let us examine the influence of the multi-party system on socialist representation. — This analysis will not deal with the first phase in the evolution of people's democracies; at that phase a socialist state organization could hardly be spoken of. On the other hand, the multi-party system is not characteristic of the second phase in the evolution of the people's democracies; the multi-party system survived by mere exception only. Although in seven people's democracies, in addition to the communist parties, also other parties operate officially, yet a multi-party system in the true sense of the term exists in Poland only. In all other States the functions of the various parties are far less significant. However, as long as the multi-party system existed in other people's democracies, the situation was very much the same as is actually now in Poland. In the People's Republic of Poland the elections take place in co-operation with the parties, however, under the auspices of the Front of National Union accepting the leadership of the United Polish Workers' Party. The candidates are put up on the united, common list of the Front of National Union, and once elected they become representatives of the Front of National Union, in the same way as in Hungary of the Patriotic Popular Front. (Naturally this is valid in a secondary sense only, as in both Poland and the other people's democracies the selection of the candidates is primarily the function of the electoral meetings, and the organs of the Popular Front cannot depart from the proposals of these meetings. The organs of the Popular Front are not bound to approve all proposals of the meetings, still the Popular Front organs have to put up the candidates from the panel proposed in the nominating meetings.)[7] Voting for a uniform list of candidates in fact indicates that notwithstanding the survival of the multi-party system this is not a case of 'party representation', but the representation of the working people in conformity with the principle which had taken shape in the Soviet Union already before the introduction of the Constitution of 1936.

[7] Cf. Clause (1) Sec. 30 and Clause (1) Sec. 31 of Act III of 1966 as regards Hungary. (Naturally there are solutions departing from this in other socialist countries.)

In a socialist State the multi-party system still in existence by way of exception has no influence on the general basic principles of representation. Direct representation prevails, i.e. no organization whatever is wedged between the electorate and the representative organs of state power.

As regards the system of indirect elections, this has all but disappeared in the European socialist countries after 1936. In the Asiatic democracies indirect election is known in the People's Republic of China only. Accordingly the organs of state power of lowest grade, i.e. the regional settlement, urban district, and small municipal assemblies of the delegates of the people are elected by the enfranchised citizens, whereas all other representative organs up to the organ positioned on the highest summit of the political organization, i.e. the All-China Assembly of the delegates of the people are elected by grades, by way of indirect elections (Articles 56 and 23 of the Constitution). Hence the deputy of the highest representative organ of state power is at the same time also a member of the organ of lower grade. In this case the delegate is not simply a representative of the electorate, but at the same time also the deputy of the organ of lower grade to the one of higher grade. This fact raises no particular problems, as it does not detract from the delegate's commitments to the electorate. However, the content of representation of the member of a higher organ of state power is of a dual character. Since for the creation of this organ several political Acts are needed (each delegate is elected by the enfranchished population, then the given organ of state power delegates, by way of election or voting, from among its own members those to be sent into the organ of higher grade) a series of obligations such as e.g. the obligation to render account, the observance of instructions, etc. arise from the representation by which the delegate is bound to each electoral body (to the voters themselves and to the representative agency). These surplus obligations add of course to the elements implied in representation, still essentially they make no difference whatever.—The principle of a limited indirect election as taken up in Articles from 165 to 167 of the Yugoslav Federal Constitution throws out altogether different problems. Partly the indirect representations of the *skupshtinas* of the federal republics, partly those of the municipalities and communities of work are coalesced here with the direct representation of the citizens, for the

Yugoslav principle of communities and that of Federation both have an interplay in the solution.

The statement may be made that under the conditions of a socialist society neither the multi-party system nor indirect election influences the general basic principles of socialist representation. The most significant trait in the socialist representative system, i.e. the close, indissoluble bonds between the organs of state power and the working people at all grades, is characteristic of all socialist States. These bonds are socially and politically determined and cannot exist unless on the ground of the dictatorship of the working class, i.e. on the soil of construction of communism. The most natural and most solid way of transmission of the will of the working class, and the people as a whole, is the guiding activity of the pioneer troop of the working class, i.e. its party. This takes place in the very same way as the general determination of the direction of activities of anyone of the organs of state power, i.e. by way of the extensive exposition of the guiding resolutions of the party, the binding force of the norms and rules of the law of the superior legislative organs relying on these resolutions, and through the party-minded activities of the communist representatives or council members operating in the representative organs of state power. All this does not amount to some sort of a merger of the representative organs and the party organizations. The operation of the state organs influences the position taken by the party and its organizations, for the council system of the representative organs of state power is the most extensive mass organization and in this manner is the most appropriate of all social mass organizations to collect the experiences and the ideas of the people on matters associated with state construction. (Here by state construction all activities, in the socialist sense of the term, are understood which are characteristic of the period of the construction of communism. Consequently, state construction in this sense implies the state-controlled development and management of economy and education, likewise a state-controlled social policy and public health.) Naturally, the problem of mutual relations between the party and the state and social organs can be best understood if the mechanism of the dictatorship of the proletariat is analyzed in operation.

So far the representative organs of state power, representation from the point of view of its contents and forms, have been studied

and now for a better understanding, a completion should follow, i.e., an attempt to reconsider that popular representation is translated into reality by the organs of state power as corporate organs, and that the expression of the fulness of popular sovereignty, i.e., popular representation in the strict sense of the term, comes within the competence of the National Assembly. (In this sense all other organs of state power would not be the organs of the representation of the people as a whole, but merely of a fraction of the people. The lower the grade at which the council functions—and this is the case also with the local agencies—the smaller this fraction will be. Still, it may be stated that also the local agencies are genuine representative organs, which perform essential functions exactly in the settlement of problems of local importance and take charge of the representation of such needs of the local population.)

What is of a great importance here is that the socialist discipline of constitutional law does not dim the representative functions of the members of the representative organs, i.e., of the particular delegates. In keen contrast with the 'theory of absorption' of bourgeois constitutional law, it is a generally accepted doctrine of socialist jurisprudence that the obligations and rights of the delegates arising from representation are not absorbed by the rights and obligations of the representative agency. The representative character of the representative organs of state power is for the greater part embodied by the representative activities of its particular members, while the conception of representing the working people as a whole is manifesting in the institution of the collective body. There the opinions and will of the groups of the electors, the political line as demanded by them, are embodied through the instructions the particular delegates are given. The supreme organ of state power cannot be atomized, nor can anyone of the councils. No groups of their members, or a single member can take over the exercise of the rights following from popular sovereignty, or express the will of the whole corporation in a normative form. At the same time the collective body does not dissolve or even up the functions of a single representative of the workers in the collective body. The delegates dispose of rights and have to perform the duties elaborated in the socialist discipline of constitutional law and defined in all their details in the legislation of each socialist country, many years before.

Socialist jurisprudence has been capable of resolving ostensible contradictions (which, however, under the circumstances of a bourgeois society are real ones) that from the point of view of the subject-matter of this book, and also in relation to the construction of the State, are of great significance: the expression—as complete as possible—of the will of the ruling class, the mandate, and responsibility of representatives, and the responsibility and general duties of representative organs.

Studying the representative character of the institution will have to be completed by analyzing the position of the delegates as the carriers and partial realizers of the representation. This is the way how to throw a light on the whole system of representation of state power. Without studying two-directionally, one inevitably comes across one or another of the errors referred to above. So attention will in this case not be concentrated on the relations under constitutional law of either only the body of representatives, or exclusively the particular representatives or council members, which might entail a blurring of responsibility in relation to either the organ as a collective body, or the persons disposing of the particular mandates.

3. LEGAL POSITION OF THE DELEGATES IN THE SOCIALIST STATE. THE IMPERATIVE MANDATE

The members of the representative organs of state power are delegates who have to meet obligations partly to their electors, partly to the organ of representation whose members they are, as defined by constitutional law, or more accurately and in general by the constitutional charter.

In the first place the question may be asked whether the relations between the representatives and the organs of state power or the electors remain the same, irrespective of whether the representatives are active in the supreme organ of state power, or in one of the local representative agencies. At first sight the problem appears to involve quantitative relations only. Still on closer examination it will be found that it has other aspects too. For the difference partly the fact is responsible that even in the rights of the representatives of the agencies on the summit of state power their membership to a representative body expressing the fulness of popular sovereignty is reflect-

ed. So e.g. the effects of an intervention of the member of the National Assembly differs from those of the intervention of a council member, whenever either of them submits a proposal of public interest on behalf of the electorate. (For instance, following a motion of the representative, the supreme organ of state power may at any time pass new legislation or introduce new rules; the motion of a member of a local government council will never entail similar consequences.)

Still this difference is not the most characteristic trait in the position of the members of the agencies of state power. What is of greatest significance in this respect is the equally democratic, popular character of the mandate of the delegates, and all that is closely associated with this character. Namely, on the one part the obligations such as the active participation in the work of the representative agencies of state power, in the enforcement of their resolutions, discharge of the commissions of public interest of the electors, maintenance of relations to the population (reporting back, consulting hours, etc.), and on the other hand such important rights as the participation in passing resolutions, the right of questioning, other supervisory rights, the different forms of immunity, etc. In this respect there is a shade of difference only among the representative agencies of state power. (Differences may be shown mostly not here but among the legal systems of the various socialist states. Still even those are insignificant.)

From the foregoing enumeration it will be clear that a group of rights and obligations ties the delegate to the agency of which he is member, whereas another group will bind him to the electorate. A study of the ties between delegate and electorate is of primordial importance, as this is the only way to establish the legal character of the mandate. (Later on it will be seen that all this is exposed to influences from another side, viz. the legal relationship to the agency of state power.)

For a socialist constitutional law this is one of the most vital problems from the point of view of representative agencies. When on the ground of the thesis that socialist democratism is an objective regularity of evolution in the socialist State,[8] the close relationship between

[8] Essentially the same position has been taken by V. F. Kotok in his paper Социалистический демократизм Советского государства (Problems of the Soviet State and law), *Вопросы советского государства и права* (editors P. E. Orlovski, I. V. Pavlov and V. M. Tchikvadze), Moscow 1957, pp. 118–23.

representatives and council members and their electors is recognized, then also the consequences of this relationship will have to be recognized throughout. And yet, when it is recognized that the delegates (a) receive commissions of public interest from their electors; (b) are bound to regularly report back to their electors of their activities (and of those of their organization); (c) may be recalled by the electors at any time—one is face to face with the known system of imperative mandate. However, in this matter opinions are not uniform in Hungarian constitutional law. For example, János Beér in his textbook on Hungarian constitutional law, published in 1960, although he recognizes the responsibility of the council members in the first place to their electorate and all consequences thereof (obligation of reporting back, recall), yet refuses to recognize the imperative mandate. "The socialist State does not recognize the imperative mandate, which would paralyze the creative activities of the representative body, and which is not needed under socialist conditions", he writes.[9]

In our opinion it is exactly the obligations of the delegates which tend to prove that here we have the case of the fixed character of the representative system, or more closely, of the application of the limitative imperative mandate to the conditions of the socialist State. We have to remember that also in its early forms the limitative (and prohibitive) imperative mandate meant that the instructions of the constituents were binding exclusively on the delegate or representative, and never on the representative body whose member he was. An instruction has no influence on the representative agency unless the majority of the representatives have uniform instructions (either for the general policy, as is the case with the imperative mandate, or in respect of certain questions, as with the prohibitive mandate). Some of the authors on the subject mistake the limitations imposed on the delegate with those of the representative body. In the event of a limitative mandate this difference is particularly striking, in fact by the mandate the representatives and council members are bound to follow a definite policy in the wider sense of the term. Hence the representatives and council members do not receive instructions in definite matters, but for the pursuance of a definite policy and, as an

[9] Beér, Kovács and Szamel, *Magyar államjog* (Hungarian constitutional law), Budapest 1960, p. 284.

addition—for a better discharge of everyday functions and the promotion of the ends of this policy—they are given commissions of public interests, to use a term of the Hungarian Council Act.[10] Since in each socialist country council members and those of the supreme agencies of state power are at the same time delegates of a block or front operating on a socialist platform[11] (in fact in certain countries the eligibility of the nominees is examined by the front or block itself in the nominating meetings and only then the nomination is accepted, whereas in others the parties united in the front agree on the acceptance of the nominees), the representatives follow the general policy of the front, which is in agreement with the will of the constituents, who in fact have cast their votes for the delegates of the front, individually or on a general list. By casting their votes the electors not merely elect a delegate, or even a panel of delegates, but at the same time approve the policy sponsored by the communist party, effectively assisted by the front which it leads.

The representative or council member must in the course of his activities abide by the line of conduct defined at the election. However, in addition, the representative organ of state power is influenced by the resolutions which are passed in the meetings of the electors, and by which the delegates are invited to express the position of their electors in the session of the representative organ of state power, before its plenum. (Most of questions are coming into existence in this sphere.) As has already been mentioned Hungarian constitutional law defines this institution as a commission given in public interest, at least as far as council members are concerned. (There is no corresponding institution as regards the members of the National Assembly.) The constitutional law of the Soviet Union calls the resolutions instructions (*nakazy izbiratelei*), or motions (*predlozheniya*) of the

[10] Clause (d) Sec. 28, Act X of 1954.

[11] In the Soviet Union the Block of Communists and Non-Party Members, in China the United Popular Democratic Front, in Poland the Front of National Unity, in Czechoslovakia the National Front, in the German Democratic Republic the National Front of Democratic Germany, in Bulgaria the Patriotic Front, in Rumania the United Socialist Front, in the Korean People's Democratic Republic the United Democratic Patriotic Front, in Vietnam the Patriotic Front of Vietnam, in Hungary the Patriotic Popular Front.

electorate.[12] Notwithstanding the marked difference in their sense these latter designations for practical purposes have the same meaning as the Hungarian term, although the latter in a somewhat overcautious form delimits the instructions of the constituents and their validity. This form of instructions of the electorate is in fact surrounded by such high barriers that are erected of necessity. In the first place the instructions cannot come into conflict with the instructions of the electorate defining the general policy. Moreover, they have to appear as a supplement to these. For that matter the epithet 'of public interest' occurring in the term of the Hungarian Council Act is in every respect watertight. As a matter of fact the representative agencies of state power cannot be torn asunder into units directly representing the interests of each constituency. Beyond the interests of the working people (i.e. national interests) for a local representative organ of state power the delegate has to keep in view the local general interests. It is exactly for this reason that questions (interpellations) to be discussed later on, are extremely appropriate forms of the submission of instructions or commissions of the electors. As a matter of fact on moving such commissions or instructions the representative himself may make sure whether the commissions in fact are of public interest, or merely representing group interests. It is exactly the strength of the Hungarian regulation that the delegate, although he is not independent of his electors even in matters of detail, has discretionary powers to decide whether the position taken by his electors is in harmony with public interest. When there is a conflict between the two he may, or is even bound to, refuse the representation of the will of the electorate.

It is essential to recognize that in a socialist State the imperative, limitative mandate is the fundamental principle directing the activities of the representatives and council members. This mandate partly obliges the delegate to an observation of the general policy as defined by the electorate, partly makes it his duty to stand for the instructions of the electorate so to say supplementing the general policy and,

[12] Cf. the decree of the Presidium of the Supreme Soviet of the Soviet Union on the specimen statutes of the rural and settlement soviets of the workers' delegates (Section 54) and a similar decree of the Russian Federation of July 19, 1968 (Section 62).

provided they are of public interest, to submit them to the representative agency of state power.

Hence in opposition to the other position taken in the discipline of constitutional law we maintain that the presence of the right of instruction in socialist constitutional law is the most positive, yet not the only, indication of the prevalence of the limitative-imperative mandate in the operation of the representative agencies of the socialist state power. It is not the only indication. A number of guarantees have sprung up in each socialist country of the term—so extensively used in political life—that "the representative is the servant of the people, of the constituents". To mention the most important ones of these guarantees we would refer to the right of questioning (interpellation), the obligation of reporting back, recall (incompatibility), the calling the delegates to account, etc.

Of these the right of question is not the most characteristic form. Still we mention it in the first place, for the reasons given earlier in this discussion. The right of question of the delegate is closely associated with one of the forms of control of direct representative democracy. In most of the cases the delegate wants to receive a satisfactory answer to the demands of his electors put forward in the form of a question. It is for this reason that the institution has been brought under regulation in each socialist country, not only in the standing orders or statutes of the supreme organ of state power, but also in the by-laws of local organizations.[13]

[13] Such and similar provisions are e.g. as regards the supreme representative organ of state power Sections 49 to 51 of the standing order passed by the National Assembly of the People's Republic of Albania, of June 21, 1958; Sections 48 to 50 of the resolutions of the National Assembly of the Bulgarian People's Republic of October 4, 1958; Sections 70 to 75 of the standing order passed by the Seym of the Polish People's Republic of March 1, 1957, supplemented on December 25, 1957; Sections 88 to 92 of the resolution of the Great National Assembly of the Rumanian Socialist Republic of December 22, 1965; Sections 46 to 48 of the standing orders of the National Assembly of the Hungarian People's Republic of August 2, 1956, as regards the local representative agencies of state power; Article 56 of the specimen statutes of the Soviet Union on rural soviets and those of settlements; Article 64 of the Act on Rural and Settlement Soviets of 1968 of the Russian Federation; Sec. 23 of Act 1763/1953 of the People's Republic of Albania; Sec. 35 of the Act of November 2, 1951 of the Bulgarian People's Republic; Sec. 47 of Act No. 16 of 1958

Most of the regulations divide the right of question of the delegates into two types, viz. the question (interpellation) proper (essentially this is the equivalent of the Russian term *zapros*), which the delegate submits in the session of the representative organ, and information, which the delegate may ask from the executives of institutions subordinate to the council, outside the session. Although the latter is also an important method for the translation of the principles of governmental hierarchy into reality (to make the members of the representative agencies of state power feel that they dispose of a right of supervision) and for the activization of the delegate, still for a number of reasons the right of question proper is of greater significance. As a first reason we could mention that the right of question cannot be considered the exclusive right and activity of the delegate. This trait is obvious mainly in the statutes of the supreme organs of state power. In conformity with the standing orders of the Hungarian, Rumanian, Albanian, Bulgarian and Polish legislatures, in the exercise of the right of question, the rights and activities of the delegate and the representative organ are interlinked. Although the questions are submitted by the particular delegates, still the organizational framework is provided by the session. The delegate may rejoin to the reply given to the question. The supreme organ of state power decides on the approval or refusal of the answer independently of the rejoinder and its content (in the event of a refusal the session may put the answer on the agenda). The delegate ceases to be master of the process he has launched as soon as he has submitted the question (interpellation), and eventually the representative organ decides on its fate. It is by this way that the question or commission of public interest, in the majority of cases raised by the constituents, becomes an item of discussion or debate. Although there is no mention of this in the statutes or other provisions governing the local agencies, still, e.g. in Hungary during the latter years it has become an established practice to decide in the session of the council on the approval of at least such answers that are given to questions.

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of the Polish People's Republic; Sec. 21 of the Act of January 17, 1957 of the German Democratic Republic; clause (d) Sec. 33 of the Rumanian Act on People's Councils; clause (b) Sec. 15 of the Czechoslovak Act of 1967; further clause (e) Sec. 27 of the Hungarian Act X of 1954.

In this connexion attention may be called to a rather interesting and generally prevailing tendency in the institution of questioning, i.e. a certain intertwining of the duties and rights of the representative organs of state power and those of the particular delegates. Without this intertwining no true mass relationship could be brought about in the operation of these organs. In this case the right of the representative organ amounts to a taking charge of the function entrusted to the representative. Henceforth the proper attendance to the requests of the electorate will cease to be the function of a particular member of the organ, and become that of the plenum. For that matter this is evident from the fact that the statutory provisions, even those applying to the local agencies of state power, distinguish with utmost precision between the question and the collection of information outside the session (in this latter instance the representative organ undertakes no functions whatever in its capacity as a collective body). Thus the right to question is of importance for two reasons, viz. (a) because it is the appropriate form of the performance or submission of commissions of public interest; and (b) because it provides a possibility for the transfer of commissions of public interest from the sphere of functions of the particular delegates to that of the deliberation and decision of the collective or representative organ. — It should be remembered that statutory provisions nowhere expressly bind the delegates, representatives and council members, to restrict their addressing questions to the council or National Assembly, or to agencies directly subordinate to agencies corresponding to these, within the limitations of the instructions of the electorate only. The institution of questioning cannot be restricted to such a method. There is no need of a majority opinion or instruction by the electorate, moreover, not even of the information of a single elector in order that the delegate might interpellate. The delegate may address, and often even does, questions to the government, or one of its members, to the procurator general in the session of the supreme organ of state power, or to the general or specialized agencies of the council in the council meeting. In all events the delegate has rights going beyond this; among them the submission of the instructions of the electorate has been mentioned by way of example only.

Another evidence of the system of the imperative mandate in the operation of the representative organs of the socialist state power is

the obligation of the delegates to report back. The constitutions of the socialist states without exception decree the obligation of the organs of state power to report back on one occasion, or two, in the year. This obligation is detailed in the statutes governing the local agencies of state power,[14] in that the council member has to render account not only of his own activities, but also of those of his council. Here the provision of the Hungarian Act X of 1954 deserves special attention. This act expressly provides that the council member is bound to render account also of how he discharged the commissions of public interest of the electors. When now the spheres of responsibility of the council member to his constituents should be delimited in the light of what has been set forth above, three distinct spheres will be discovered, viz. (a) responsibility for the performance of functions assigned to the member in the council or its agencies (these functions are not necessarily limited to inside work, but may extend to educational work to be done among the people, etc.); (b) particular responsibility for the performance of duties in respect of commissions of public interest. However, here there is no question of calling the member to account for a possible failure to achieve positive results (the performance of commissions does not depend wholly on the delegate; often financial difficulties, and even disagreement of the council may prevent the member from discharging the commission entrusted to him, even when otherwise he agrees with the electorate); (c) finally the responsibility of the council member in his own person for the good or bad work of the whole representative body. (In the latter case the intertwining of functions of the organ of state power and its member will again be manifest; the delegate will have to discharge not only his own duties, but he may have to fight in order that the other members of the organ similarly observe their obligations, and not in the last resort in order that the organ itself might make use of its rights, and perform its functions as an organ of state power).

[14] Section of the Soviet specimen statutes; Sec. 67 of the Act of the Russian Federation; clause (b) Sec. 16 of the Czechoslovak Act; clause (3) Sec. 46 of the Polish Act; Sec. 33 of the Rumanian Act; clause (g) Sec. 22 of the Act of the German Democratic Republic, and clause (f) Sec. 28 of the Hungarian Act.

In the same way as the constituents have transferred their rights (in the form of popular sovereignty) to the delegates through the act of election, and so brought to life the representative organs of state power, they may call the particular elected delegates to account for the operation of the representative body, and as will be seen subsequently, may even hold them responsible for a dereliction of duties. To the individual election, the creation of the collective organ by individual methods, there corresponds on the other side the scrutiny of the operations of the organ of state power—through an examination of the activities of the particular delegates. This is the reporting of the delegates.

The site of reporting is the meeting of the electors. The meeting of the electors which will be dealt with later on, is an institution of the enfranchised citizens organized under constitutional law, which embodies the will of the constituency at the nomination, at the reporting back, and at the recall. (However, in all three acts the meeting operates differently, and in a different form.) One fact should be noted, namely that the meeting of the constituents does not mean the actual single convention of all enfranchised persons, or a majority of them. Technically it would be impossible to convene such a meeting in territorial units larger than a community. Here the case is of a large number of meetings of the population, each attended by a small number of electors; these meetings put together make up the majority of the electorate. As regards the reporting back there are no provisions in any socialist country, which would establish a quorum for these meetings. However, it would by no means be a correct practice if either on the level of the National Assembly, or on that of the local council, reporting back took place in the presence of a fraction of the electorate only. The significance of the institution of reporting back would render a solution of this type unjustified and unjustifiable for the purposes of an imperative mandate. In our opinion it appears desirable to organize the reporting meetings within the limitations of the constitutions or statutes in a way that these should be attended by the majority of the electorate and that the electorate should be given an opportunity to express its opinion of the operations of the delegate and the representative organ of state power. (Actually in conformity with statutory regulation of today no legal obligation can be established in this respect.)

On this occasion the meeting of the constituents does not only record or criticize the activities of the past period, but gives new instructions to the delegate. However, the instructions or commissions of the electorate can never represent the position taken by a small group only. The delegate has to make it clear which layers of the electorate are in agreement with the motions brought forward in the meeting. As a matter of fact—by nature—the commissions of public interest must be in harmony not only with the general interests of the working people, but have to express the wishes of the majority of the population of the constituency, and not those of some sort of a minority.

It is by this way that the system of reporting back has become one of the most important milestones in the operation of the representative institutions. Alongside of many other—yet not so stable—occasions this systematic tie creates an atmosphere of confidence between the delegate (and the representative organ of state power) and the electors. When it is said that it is the organized character which imparts force to this tie, so in the practice of building the State the task will be to improve this stability of ties and eliminate from it the earlier contingent element. There is no need for further statutory regulation. Correct practice will help to settle earlier problems.

One of the strongest evidences of the existence of an imperative mandate is the socialist form of responsibility of the representative. While the constitutional laws of the bourgeois countries recognize the responsibility of the representatives before their own conscience only, in the socialist countries they are responsible—in a natural way—to the electorate. (The delegate is a member of the representative organ of state power, therefore his activities cannot be viewed indifferently by the representative body either. Thus, the representative organ too has to dispose of definite disciplinary means for a condemnation of the inappropriate conduct of the delegate. However, for the purpose of the present study this is a problem of secondary importance and therefore we shall revert to it only after the first question has been answered.) We may say that responsibility is omnidirectional. The delegate will come into conflict with his electors not only when he commits a socially dangerous act, i.e. an act infringing criminal law. A representative or council member may be held responsible also for the violation of the moral principles of the workers,

in fact his functions insist upon his standing on a high moral level in all respects. However, beyond this, the non-observance of the instructions of the electors, the neglect of the duties of a delegate may also prompt the electors to raise the question of responsibility. This is the reason why the constitutions of the socialist states provide for problems of responsibility of the delegates, and do so in general in connexion with the question of recall.

In conformity with Section 142 of the Soviet Constitution of 1936 the constitutions of most of the people's democracies declare the possibility of the recall of representatives or council members at any time, provided that the majority of electors passes a resolution to this effect in the manner prescribed by statute. (Cf. Clause 2, Article 2 of the Polish constitution; Sec. 4 of the Bulgarian constitution; Part IV, Section 77 of the principles of the Yugoslav federal constitution; Article 61 of the Chinese constitution;[15] Sec. 5 of the Albanian constitution; Clause (3) Sec. 62, and Clause (3) Sec. 30 of the Hungarian constitution.) However, as regards the regulation of recall the constitutional provisions differ widely from one another. It should be noted that (what is of major importance for the following discussions) in the majority of the socialist countries the problem of recall of the members of the supreme representative organ of state power by their electors has not been successfully solved. The problem has emerged not only where a general ticket is predominant.

As regards the local government councils, here three types of recall may be distinguished: (a) recall by the open vote of the electors (in the meeting of the electors); (b) recall by the electors by secret ballot; and (c) recall by the corresponding organ of state power for and on behalf of the electors. These principal types are completed by a few variants (e.g. the need for the approval of the superior organ, the granting of a right of appeal, etc.).

The first form is perhaps the most widespread. The statute of the Supreme Soviet of the Soviet Union of October 30, 1959 on the recall

[15] The article of the Chinese constitution, owing to the indirect system of election, conferred the right of recall only on agencies of the local popular meetings electing the delegates and the constituents of the towns not divided into districts, urban precincts, districts, districts of nationalities, and settlements, as far as the popular meetings are concerned.

of the delegates to the Supreme Soviet also introduces this system. Motions may be submitted by the central and territorial organs of the social organizations and associations to the Presidium of the Supreme Soviet. If in the opinion of the Presidium the motion is sufficiently substantiated, then a voting will decide. The meetings of the constituents decide by open vote, and before the meeting canvassing is allowed for both recall and against it. For the recall of the delegate the majority of votes of the electorate of the constituency is required. Section 62 of the specimen union regulation of 1962 on rural and settlemest soviets and a similar statutory provision enacted in the Russian Federation refer to a recall statute to be promulgated at a later date, still both regulations declare that the majority vote of the constituents is required for a recall of a delegate. In conformity with the practice established for several years, already the resolution decreeing recall has to be passed in the general meeting of the citizens. A similar provision has been taken up in the Czechoslovak suffrage act. Accordingly a proposal for recall is submitted by the National Front to the Presidium of the National Assembly, to the Presidium of the Slovak National Council, or to the council of the competent national committee, as the case may be. Of this type of recall the Hungarian regulation appears to be the most elaborate. Sections 58 and 59 of Act III of 1966 declare that on the initiative of the Presidium of the National Council of the Patriotic Popular Front, or of a competent local organization of the Front the meetings in charge of nomination may forward proposals for a recall. In like manner as the elections, so also recalls take place under the auspices of the Popular Front. (This organ forwards the proposal for recall to the council when it affects a council member. The council, or the committee of the constituency convenes a public meeting, where the electors decide by an open vote on the recall.) For a decision on recall at least one half of the electors have to attend the meeting, and for the recall itself at least one half of the votes is required.

An example for the system of recall mentioned in second order is the Polish Act of the 31st October, 1957 on the regulation of the election of the popular councils. Sections from 75 to 82 of the Act bring under regulation the vote by ballot in all its details. For a recall the organization or institution may submit a proposal that at the time of the election proposed the nomination of the delegate. The

mandates committee of the popular council institutes investigations in the course of which the delegate may plead his case. The council then decides whether or not the proposal should be submitted to the electors. For a resolution the presence of at least one half of the council members and at least two thirds of all votes cast by them is required. After the resolution has been passed the proceedings of recall begin. The voters of the constituency are called up to cast their votes. Voting takes place in conformity with the rules of election, but on the ballot paper there is only one question, i.e. whether or not the voter proposes the recall of the delegate. When the absolute majority of the electors vote for a recall, the mandate of the council member ceases.[16]

A vote by ballot for recall has been decreed by the Yugoslav Act No. 13 of 1963. Sections from 156 to 182 of the Act contain rules going into the minutest details on the motion of recall, the inquiry, voting, and the order of voting. While the members of the organs elected by universal suffrage are recalled by the electors, those elected on the councils of the communities of work are recalled by the communal *skupshtinas*.

Finally an altogether different method of recall of council members is that decreed by the council. This method is similar to the one to be discussed later, and has been enacted in Hungary as the institution of incompatibility. Section 39 of the Bulgarian Act of November 2, 1951 on popular councils declares that a proposal for recall may be submitted by the nominating agency. The resolution is passed by the popular council whose member the delegate is. The council has a quorum when at least one half of the delegates is present. The resolution deprives the delegate of his membership, provided the resolution is approved by the council of higher order (for a district council by the Presidium of the National Assembly). An essentially similar system has been introduced in the German Democratic Republic on the recall of the members of the People's Chamber Act of 31st July 1963. In conformity with Sec. 19 the electors decide in a meeting convened by the competent committee of the National Front of

[16] Stanisław Gebert mentions in his paper that there was not a single case of recall during the last parliamentary term.—Cf. Prawo wyborcze po nowelizacjy z. 1960 d. (The franchise after the novelization in 1960), *Panstwo i Prawo 1961*. No. 3, p. 494.

Democratic Germany on the submission of a proposal purposing the recall of a member. The People's Chamber or the competent body of popular representation decides on the recall of members.

When now, irrespective of the procedure, the institution of recall is studied in any of the socialist countries, we will notice that recall is in the one way or the other associated with the act of the electors: either at the initiation of the act purposing recall, or at the decisive phase of preparatory work terminated by a resolution. This follows from the position of socialist constitutional law, according to which a recall is the reversal of the act of election: those are entitled to deprive the representative or the council member of his office who at the time of election raised him to this dignity, i.e. the constituents. (A departure from this principle had been in force in Hungary before the Acts IX and X of 1954 were put on the statute book. At that time, owing to the system of a general ticket, the great fluctuation of membership even in the local councils made the introduction of co-optation necessary. Since under this system the local agency of state power could confer the rights of a delegate on a non-elected citizen, obviously in the course of the traditional procedure of incompatibity the council could withdraw these rights from both an elected and a co-opted member. However, Acts IX and X of 1954 have discontinued this system, which was created by way of decree.)

This trend of thought calls for completion. As has been clarified earlier, the bourgeoisie has deprived the idea of representation of its radical content by denying the existence of an imperative mandate and simultaneously also that of the right of recall. The classics of Marxis–Leninism considered the right of recall a minimum of socialist democratism,[17] and tied it up with the institution of the imperative mandate. Hence recall is considered a natural concomitant of the franchise only where the radical form of suffrage dominates, in a consistent form only in the socialist countries where the imperative mandate has been made an institution. Under these circumstances the right of the constituents must be considered the most important means of calling the delegates to account. Consequently the right of recall confirms the existence of the imperative mandate. The statutory

[17] V. I. Lenin, *Полное Собрание Сочинений* (Collected works), том 32, Государственное Издательство Политической Литературы, Москва 1962, стр. 118.

provisions governing the organs of state power sum up the primary causes of recalling of the delegates in the failure of the delegate to retain the confidence of his constituents, or to remain faithful to the platform on which he has been elected.[18] So the right of recall following from the imperative mandate has become the most important guarantee of the responsibility of the delegate.

As has already been referred to earlier, the representatives and the council members are not only delegates of their electors, but upon their election, simultaneously members of the representative organ of state power as a collective body. The dignity and the functions of a collective body makes the supervision of the acts and conduct of its members imperative. The representative organ of state power as the embodyment of sovereignty (i.e. the supreme organ of state power or part of it) cannot be denied the right to act as a disciplinary authority in respect of its members. (Immunity to be discussed in detail later expressly demands that the delegates enjoying a higher order of protection should in the first place be called to account by their own organ.) The question is, how far this disciplinary authority extends, and whether it implies the right of ousting the member from the representative body.

On answering this question, although it is a matter of principle, an extremely practical consideration will have to be taken into account. The question will have to be asked whether the institution of recall is the appropriate means to free the organ of state power of an unworthy member, who may even jeopardize its dignity. In our opinion the higher the elected organ stands in the hierarchical order and the greater a number of voters elect it, the more problems will emerge in connexion with the recall. (The situation will be the same even where the least difficulty will be encountered, i.e. at a vote by ballot.) Hence in our opinion, even in the total absence of a statutory regulation, wherever the protracted procedure of recall might be liable for a grave moral damage to the representative agency of state power, the disciplinary authority of such an agency should be extended even to a deprival of the mandate.

This statement can in no circumstances be construed so as to the

[18] For example, Section 39 of the Bulgarian Act on people's councils and Section 70 of the Act of July 19, 1968 of the Russian Federation.

approval of the extension of disciplinary proceedings to the prejudice of the right of recall. A precise elaboration of the forms of recall is a significant task for the legislative organs of the socialist states, in fact this is one of the methods of the reinforcement of socialist democratism. The main objective is to contrive methods how at the councils of higher order, or at the supreme representative organs of state power, where a member is elected by a large number of electors, the procedure of recall can be simplified and sped up without reducing the chances of the population to institute a debate on the matter. (As a matter of fact it is exactly this that is missing at a vote by ballot, and therefore it is to be feared that the interest of the population in the matter will not rise to the desired degree, and therefore the electors will take part in the voting in small numbers only.) It would be an advancement in the future if in the course of the procedure of recall the social organizations were to a greater extent invited to a participation in the debate and decision (or at least in the preparatory work) on these problems.

Reverting to the disciplinary authority of the representative organs of state power it has to be pointed out that this authority relies on the fact that the organ embodying popular sovereignty necessarily purges its ranks of unworthy elements. In this statement special stress is laid on the presence of sovereign rights as to the organs of state power, whatever name may have been given to an institution (recall, withdrawal of the mandate, incompability, etc.). The Soviet provisions do not include this right for the soviets. On the other hand in the majority of the legislations of the people's democracies provisions have been taken up authorizing the representative organs of state power to withdraw or annul a mandate. This may be explained by the fact that in the Soviet Union the traditions of recall are deeper-rooted than elsewhere. At the same time the absence of a statutory regulation does not mean as if in earlier years co-optation had not been of frequent occurrence, and consequently also the withdrawal of the mandate, in the practice of the Soviet organs.

Of all statutory regulations enacted in the people's democracies the Polish franchise order of December 22, 1960 is perhaps the clearest. This order speaks of the problem as the 'withdrawal of the mandate'. According to Articles 73 and 74 of the order, the people's councils may deprive the council member of his mandate. The reasons for

deprival had already been defined in the earlier order. Among these are e.g. a conviction of council member for a criminal act committed for the sake of gain, or an infamous motive, the grave violation of his oath; conduct conflicting with the dignity of his office etc. The relevant resolution cannot be valid unless the council member has been given an opportunity to plead on his own behalf, or explain his acts or conduct. For the validity of the resolution of the councils operating on the lowest level the approval of the district council is required. The member has a right of appeal against the decision of the people's councils. Hence the procedure conforms in every respect to the theoretical considerations, it reflects the relationship of the people's councils to their members. The designation of the institution, i.e. withdrawal of the mandate, is also accurate here. The Bulgarian and German systems of recall mentioned earlier will have to be considered rather the disciplinary authority of the councils or the supreme representative organs of state power. In fact the functions of the electorate are insignificant here, and the resolution on the withdrawal of the mandate is passed by the organ of state power itself. It is only on account of the designation that both systems have been included in the category of the institution of recall.

Incompatibility as referred to in clause (3) Sec. 11 of the Constitution of the Hungarian People's Republic undoubtedly belongs to a type of the withdrawal of the mandate. The institution was later on developed by Resolution No. 3 of 1955 of the Presidential Council of the People's Republic— in respect of local governmental councils. Before proceeding to a detailed analysis of this Resolution we should like to add a few comments to the term itself. It is a known fact that incompatibility in the parliamentary system of the bourgeois States is the last formal remnant of the Montesquieuian theory of a separation of the branches of power. Among the cases of incompatibility of earlier Hungarian public law those of official subordination and incompatibility of personal interestedness relied on the fiction that the representatives (in a bourgeois legislature where the head of the government is the leader of the majority or the coalition, or the head of the party leading the coalition) could be independent of the government. (There was a departure from this principle in the institution of criminal incompatibility, or the incompatibility of a go-between.) In the Hungarian People's Republic, in like way as in other socialist

countries, incompatibility in the earlier sense is out of the question. Therefore the choice of the name was by no means a lucky one. Undoubtedly the legislator was looking for a traditional name of established currency at the creation of the constitution in order to express that the activities of the delegates, representatives as well as council members, had to be scrutinized in the light of moral and legal requirements higher than those valid for the ordinary man in the street. Unfortunately, the name 'incompatibility' has a rather disturbing effect exactly on those in whom it calls forth the memory of days begone.)

We can but agree with János Beér, when he explains that under socialist conditions the sense of 'incompatibility' is something altogether different.[19] The institution which in the constitutional regulation has received the name incompatibility is therefore not the incompatibility of the days before the Liberation of this country in 1945 and cannot be considered related to the institution still living in bourgeois states. It is related to the right of the representative organs of state power of the socialist States by which these organs may deprive their own members of their mandates.

The above quoted Resolution of the Hungarian Presidential Council on the incompatibility of the council members is an accurate and useful legal rule for the very reason because here an attempt has been made to seperate the procedure of incompatibility from that of the recall. In Section 3, the Resolution declares that "the termination of the mandate of the council members unworthy of confidence is in the first place and in general guaranteed by the right of the electors to recall the members of the council in conformity with the law". The rule considers moral unfitness the most important criterion of incompatibility, and by way of example enumerates a few cases (commission of an indictable offence, culpable opposition to the political order, or the rules guaranteeing civic discipline). Hence no procedure of incompatibility can be instituted against a council member who does not perform his functions or meet his undertakings to the electorate. In this case a procedure for recall has to be instituted. As for the procedure of incompatibility it is to note that at least at the preparatory phase the competent territorial local committees of the Patriotic Popu-

[19] Beér, Kovács and Szamel, *Op. cit.*, p. 297.

lar Front or mass organizations may join in the proceedings through their leading organs. They may give notice of the existence of incompatibility. The resolution is passed by the council (the method of passing the resolution is uniform with that in force for other procedures) after the *ad hoc* committee of incompatibility has tabled its motion. The rules on the resolutions may be considered the most interesting part of the procedure of incompatibility, as in these rules several forms of a participation of the electorate have been laid down. In addition, the council partly may dismiss the notification, partly warn the council member of the incorrect nature of his conduct, activities or negligence, i.e. it may establish the existence of incompatibility, and consequently decree the termination of the mandate of the council member, or else the council may refer the case to the electorate for further action. In this case the resolution of the council decrees that the case has to be submitted to the meeting of the electors in order that they might decide on the recall of the member. This in fact terminates the procedure of incompatibility, and changes over to one of recall. This is in particular of necessity when such facts come to light of the council member that come within the competence of the electors, and are not in conflict with the rules of incompatibility. However, this is not the only method of inviting the electorate to a participation. Section 11 of the Resolution declares that resolutions of the council decreeing a warning to be given to the member, or establishing his incompatibility, must be made known to the electorate of the constituency. In this case the electors cannot amend the resolution.

There is a striking difference between the Polish and the Hungarian methods inasmuch as the Hungarian regulation does not recognize the right of appeal by the council member. An unrestricted right of appeal, against a decision of the representative agency of state power is not in all circumstances advisable. Particularly not when the legal rule, like e.g. the Polish regulation, with an almost exaggerated caution insists on a qualified majority for the act. On the other hand the Polish regulation applies exclusively to members of the people's councils and does not affect the Seym. Again the Hungarian constitutional regulation applies in the first place to the members of the National Assembly, and this in its standing orders of the 2nd August, 1956 includes a few statements on incompatibility. However, there are no provisions in the standing orders on the possible content of the resolutions,

so it can be inferred that only two types of resolutions may be passed, viz. the one dismissing the notice, and the other establishing the existence of a case of incompatibility. In the National Assembly the procedure has to take place in conformity with the standing orders and not with the Resolution of the Presidential Council quoted earlier. There is no reason whatever for the application of the Resolution of the Presidential Council beyond the provisions of the standing orders.[20]

The two most important forms of calling the delegates to account have been discussed above. The recall and the withdrawal of the mandate by the representative organ of state power do not bar other methods of calling a delegate to account. In fact there may be acts of a lesser significance than those which have been specified in connexion with the recall or withdrawal of the mandate. A variety of hues and shades of responsibility will be encountered in the course of activities of the council member or representative. As regards acts of minor importance, which call for moderate disciplinary measures only, their settlement comes within the competence of the representative organ of state power, for the very reason because here disciplinary procedure will entail in the majority of instances reprisals for activities conflicting with the rules of the corporation. It is a characteristic feature of the standing order of the National Assembly that Sec. 35 refers to its competence the exclusion from the session of the member displaying an attitude unworthy of the National Assembly. Essentially the same is decreed in Sections 24 and 23 of the Presidential Resolutions Nos 16 and 17, respectively, of 1954 in the case of the council and council members. Article 9 of the standing order of the Polish Seym of March 1, 1957 extends the disciplinary proceedings to members who neglect their duties as members, or deport themselves in a manner unworthy of their dignity. In this case the mandates committee institutes investigations and then submits its proposal to the Seym. As an outcome of the proceedings the Seym may exclude the member from a session, or even more. Obviously, only disciplinary cases of minor importance are treated in this form and there can be no question of a case which would injure the dignity or interests of the supreme representative organ of state power in any graver manner.

[20] In this respect we cannot agree with the opinion set forth by Beér, Kovács and Szamel, *Op. cit.*, p. 298.

Other problems of responsibility will not, however, establish a relationship between the delegate and the electorate or the representative organs of state power. A possible financial liability will thrust into prominence the procedure of a civil court, whereas criminal liability call the criminal court into action. In the majority of the socialist representative organs, criminal proceedings are preceded by proceedings of immunity, which will be discussed later. The problem of financial and criminal liability goes beyond the scope of the present study, so it will be ignored here.[21]

On summing up what has been set forth in this section the conclusion appears to be justified that in a socialist State, in a representative organ of state power, it is the imperative mandate that establishes ties between the delegates and the electorate. The guarantees are the instructions of the electors (commissions of public interest), reporting back, recall and indirectly the right of question (interpellation). Beyond these there are certain others to which the analysis will have to be extended whenever it is intended to segregate problems such as the responsibility of the delegate from those associated with the imperative mandate. We have by no means exhausted the problems associated with the legal position of the delegates. All that has been discussed so far has merely served to substantiate that in a socialist State the imperative mandate is dictated by necessity, and that the conclusions associated with it will have to be drawn separately in each case whenever it is intended to define the position of the representative organs in the state organization.

4. SYSTEM OF CONSTITUENCIES. THE TERM OF THE DELEGATES' MANDATE AND OF THE OPERATION OF THE REPRESENTATIVE ORGANS OF STATE POWER. SAFEGUARD OF THE DELEGATES' RIGHTS

For a closer study of the representative system a few further problems have to be settled that are omitted in the previous section. In fact when studied only loosely, these problems come into contact at several points with the principal question discussed before.

[21] See Otto Bihari, *A tanácsok bizottságai* (Committees of the councils), Budapest 1958, pp. 85–7, where this set of problems is analyzed in respect of the committee members.

There is complete unity in the questions of principle of the franchise in the socialist countries. There is no difference in that suffrage is universal equal (proportional), and that there is secret ballot. (In the Polish system, for a few years only, the industrial constituencies figured as exceptions. There is a unique system of indirect elections in the People's Republic of China, where building of socialism is in progress on a vast area and under highly complex social conditions. Here direct elections would involve problems which could hardly be tackled.) On the whole the statement may be ventured that with insignificant exceptions the electoral systems rely on uniform principles in the socialist world. There may be differences in the procedure affecting minor details, however these derive in most instances from the size of the territorial units.

The only difference of significance exists in the system of constituencies. In general two principal forms of constituencies have developed in the socialist states, with a few variants. The method of solving the problem of the electoral system in a particular country may have an influence on other matters of importance, such as the calling the council member (or the representative) to account, or the work in the constituency, reporting back, and even the recall.

It is generally known that in a bourgeois State in elections based on the single-member principle, i.e. where a simple majority may decide the issue, often the minority may win. So that the representation of the parties in the legislature may be wholly distorted compared with the proportion of votes cast for them. The proportional system of election is relatively more democratic and just. Here single-member constituencies are out of the question, so that votes have to be cast for a general ticket with several candidates on the panel. This system may come into consideration when in a given bourgeois country there are several political parties, where rather the representation of the parties is essential. (Here the term relative democratism only implies that a suppression of the smaller parties is not possible and that there are fewer opportunities of gerrymandering and other tricks.)[22]

[22] It should be noted that in Hungary the two elections that took place after the Liberation, when the parties took part with separate lists (1945 and 1947), were based on the proportional system.

However, in the socialist states the existence of direct representation and non-existence of multi-party elections usual in the bourgeois world, bring about radical changes in the situation. Also we have to remember that the equal (proportional) suffrage in these countries puts a stop to the distortion of majority opinion, and provides means for a just representation. At the same time in the socialist countries the objective is to achieve as close relations as possible between electorate and delegates. This end is served by fixing a relatively low number of electors per delegate in the franchise laws. Consequently, in comparison with the number of members of a bourgeois legislature or local government body, the number of members of the representative organs of state power in a socialist country is relatively high. Bearing in mind this condition the system of constituencies has to be viewed from an aspect differing from that of a bourgeois state. What may be said in this connexion is that the earlier rules are not necessarily applicable under the new conditions in Hungary. For the time being let us not infer anything further.

Of the two systems of constituencies the first is that of a single-member representation. The oldest traditions of this system are known to have existed in the Soviet Union. In fact the early system of open vote had brought into life this simplest form in the Russian Federation: one constituency–one member. The franchise rules actually in force mostly sponsor this system. So Sections 24 and 25 of the decree-laws respectively of the Soviet Union of January 9, 1950 and of the Russian Federation of December 11, 1950 on the election of the Supreme Soviet expressly declare that each constituency elects a single member only. From Section 125 of the decree-law of October 2, 1950, amended on December 11, 1954 of the Russian Federation on the election of the local soviets the conclusion may be drawn that the single-member constituency is a rule also for local agencies.[23] Similarly a single member is elected for each constituency under the Bulgarian Act of February 12, 1953 (Section 25). The Hungarian franchise law, in Sections 12, 13 and 50 of Act III of 1966 lays down the system of single-member constituency. This is of interest all

[23] As a matter of fact the law refers to the case when none of the candidates gains the absolute majority and polling has to be repeated for the two candidates who have obtained the largest number of votes.

the more because the earlier franchise law favoured the general ticket for both the local government councils and the National Assembly, and the elections to the latter took place on a general ticket for many years.—What are exactly the advantages of the single-member constituencies? In the first place the territory in which the member has to transact the business arising from his function is relatively smaller. A single delegate is associated with the electorate of a given area; he may be entrusted with commissions of public interest and his responsibility cannot be shifted to another person. The member has to report back to the constituents of his election district, the procedure of recall can be simplified and no appreciable difficulties will arise. Obviously the advantages of the single-member representation are manifest mostly in organs of a lower order and of limited competence. These are the places where direct representation with all its concomitants is realizable most (here only the close forms of the relations to the population should be remembered).

The other form is that of the general ticket. There are systems where the list has to be approved or rejected wholesale, and here also substitutes are elected. On the other hand there are socialist countries where certain names may be struck off the general ticket, and the candidates of a definite number for who the largest number of votes have been polled are considered elected (e.g. the system introduced by the Polish Act of December 27, 1957). In all events several members are elected in the constituency and not a single one. In Poland where the general ticket is in force for the election to the Seym as well as to the people's councils, the State Council establishes the number of mandates. The numbers of representatives to be elected for a constituency varies between 4 and 9 in most cases.[24]

In the light of what has been set forth so far no objections can be raised to the continuation of the proportional system when it comes to elect the supreme representative organs of state power. Still in

[24] It is characteristic that Stanisław Gebert in his paper *Prawo wyborcze po nowelizacjy z 1960. r* (The franchise after the novelization in 1960) recognizes the advantages of single-member constituencies on the ground of the "closer relations between the delegate elected in the given constituency and the population", still he sponsors the proportional system by emphasizing the need for a better harmony between the united front and the representation; *Państwo i Prawo 1961*, No. 3, p. 490.

most instances traditions left over from the past may be quoted in favour of the system rather than common-sense reasons. In the countries where all consequences of electoral democratism are accepted wholesale position has been taken in favour of the single-member constituency.—Although there are no prohibitive provisions in the suffrage laws in the socialist countries, no separate lists or parties are put up for election. Everywhere nominees or lists representing the block or front, and its political programme are proposed to the electorate. Consequently, no lists are needed figuring as guarantees at proportional voting. What is more essential is the promotion of a close relationship between the delegate and his constituents. This being namely one of the conditions of direct democracy and of the invitation of the population to participation in governmental work. Therefore on principle and on practical considerations the reinforcement of the system of single-member representation is recommended also in the socialist States.

To this exposition another supplementary statement has to be added. In certain socialist countries the practice has become established that as many candidates are proposed as may be elected in the respective constituency. Hence the constituents merely decide on the acceptance or refusal of the candidate. However, it should be remembered that this is mere practice, or constitutional tradition, as Kotok writes. There are no traces of this method in the suffrage laws; on the contrary, the rules governing local elections in the Russian Federation quoted above declare: "When none of the candidates polled the majority of votes . . ." etc. (Section 125). In this connexion Kotok contends that "the regulation governing the elections to the supreme and local representative organs decrees that in each constituency several candidates may be put up, still, according to the established custom only a single candidate is nominated in each constituency."[25] However, we should not say that this is the generally recognized position of socialist constitutional law. The opinion which is making headway in wide circles is rather in favour of the introduction of such single-member constituencies with several

[25] Cf. V. F. Kotok, A népképviselet és a közvetlen demokrácia kapcsolatának fejlődése a Szovjetunióban (Evolution of the mutual relationship between popular representation and direct democracy in the Soviet Union), *Jogtudományi Közlöny 1961*, No. 3, p. 149.

candidates are proposed, wherever the need arises for it; particularly at the lower-grade representative organs of state power. This would cause no serious problems even if the present system of election remains in force. This position is reflected in Section 41 of the Rumanian electoral law governing the elections to the Great National Assembly and the people's councils, and even more emphatically in clause (2) Sec. 28 of Act III of 1966 of Hungary.[26]

It can be inferred that there is no uniform regulation in the socialist States concerning the details of the election of the members of the representative organs of state power, although there is a uniformity in regard of the basic principles. The system of single-member constituencies with a single candidate—or several—may be proposed, may be considered predominant and best suiting the ends of the socialist constitution of the State. This system in fact creates the maximum of technical possibilities for close ties between constituents and delegates.

As regards the question of the term of the mandate of the delegate, this is significant insofar that the delegates enjoy their rights and have to discharge their functions as such between the two dates, viz. the conferring of the mandate and its termination. It is only within this period that the delegate can act as member of the representative organ of state power. For this reason the definition of the starting and terminating dates is of considerable importance. It is relatively easier to establish the former date; in fact the functions of the delegate are beyond doubt tied to the act of election, and currently the law and jurisprudence of the socialist States do not recognize co-optation as a method of partial or wholesale creation of the representative organs of state power.

Constitutional law may designate three dates as those establishing the starting date of the functions of the delegate, viz. (a) the time of closing the polls, i.e. when the constituents have actually conferred their rights arising from popular sovereignty on the delegate; (b) the date of the presentation of the mandate, and finally (c) the date of confirmation of the mandate by the mandates committee, i.e. the date of creation of the representative organ of state power. An

[26] Cf. O. Bihari, Hungary's New Electoral Law. *The New Hungarian Quarterly VIII*, No. 26 pp. 100–3.

analysis of the three possible answers to the question is the subject-matter of the following discussion. There may be arguments in favour of all three; however, at each of them difficulties will also be encountered.

It speaks in favour of the first assumption that the functions of the delegate are in reality created by the act of voting. With the closing of the polls the expression of the will of the electors may be considered terminated. When the majority of the electors has cast its votes, and more than one half of the electors going to the polls have cast their votes for the candidate or the list, this may be construed as an expression of the confidence of the electorate and as the transfer of their rights arising from popular sovereignty on their part. However, the fact is established by a separate official act at a later date. Until an official declaration of the fact has not yet taken place, in reality the representative or council member cannot avail himself of his rights, nor can he be called on to perform his functions as a delegate.

After closing the polls the results of voting have to be established, and laid down in minutes, to be followed by the presentation of the mandate. This latter act is the closing of the electoral procedure in the proper sense. The official declaration of the results of polling and the presentation of the mandate of the constituency to the delegate take place at the same time. The act of election appears to be perfect. The only difficulty is implied in the fact that in each socialist country the scrutiny of the results of polling, incidentally not by an extraneous organ, but by the plenum of the representative organ of state power, figures as a constitutional guarantee. What is the case when the mandates committee finds that the declaration of the results of polling by the election committee was not correct, and any of the conditions required for the validity of election has not been met? There is no doubt that the act of the election committee is null and void, and so not from the date of the decision of the mandates committee of the representative organ, but from the very outset, from the date of election the person concerned cannot be considered delegate.

On the other hand it is evident from the statutory provisions that the act of the mandates committee of the representative organ of state power does not create the mandate of the delegate, but merely establishes or checks its validity. The representative organ has in fact a significant role only when it pronounces a statement in the

negative. As a result of this statement the mandate of the delegate fails to come into being—with retrospective force. Otherwise the statement is not of a constitutive character. Hence the date of the decision of the mandates committee cannot be considered the beginning of the term of the mandate. Eventually there remains, in complete harmony with the relevant literature of constitutional law[27], but to put the date of the origin of the mandate to the closing of the polls, or to the presentation of the mandate. Still, there are certain conditions to be clarified. Hungarian electoral procedure has developed in a sense that on the mandate the date of polling and not of presentation is entered. So in Hungarian practice the problem has been simplified insofar that the date of the mandate coincides with the date of polling. The date of the presentation of the mandate is not established officially. In this case the date of the origin of the electoral mandate has to be transferred to the day, or more precisely, to the closing of the polls. In the event the two terms do not coincide (this is defined by the electoral rules and the practice attaching to it in the given State), in our opinion, the date of the presentation of the mandate has to be considered the beginning of the electoral mandate. For though the candidate cannot even be nominated without his previous consent, the mandate is made known to him by its presentation.

In this connexion in the first place we have to remark that the presentation of the mandate presupposes the votes polled legally and in the statutory proportion, i.e. the presentation of the mandate refers back to the fact of polling. We may even say that the presentation of the mandate is tied to a resolutory condition. When the mandate of the representative is not verified, then this decision of the mandates committee will as a condition of avoidance entail the termination of the mandate. On the other hand the condition points ahead to the decision of the mandates committee, which after the event confirms the legality, lawfulness and correctness of the presentation of the mandate. This explains the position that the negative decision of the mandates committee avoids the act of the electoral committee *ex tunc* and not *ex nunc*. If the condition of avoidance were missing no such conclusion could be drawn. We should be forced to agree to an *ex nunc* nullity, which from all points of view would involve

[27] Cf. Beér, Kovács and Szamel, *Op. cit.*, p. 284 (by J. Beér).

a number of complexities, and mean the legalization of an unlawful act even though for a transient, short period only.

All this confirms that for the perfect acquisition of the mandate of a representative the completion of all three acts is needed: the closing of the pools in the proper manner and with the proper result, the presentation of the mandate, and finally the confirmation of the validity of the mandate by the representative organ of state power.

The beginning of the functioning of the members of the representative organ of state power has been established in this sense; however, it does not follow that the same date of beginning has to be accepted for the representative organ or body of state power as a whole. This statement is supported by a fact to be analyzed later on, i.e. the legally organized scope of the activities of the representative organs. As a matter of fact it is not argued that under the law of most of the socialist States part of the delegates dispose of their rights and have to discharge their duties as delegates in the event of the dissolution of part of the representative agencies of state power (e.g. the members of the Presidential Council of the Hungarian People's Republic or the members of the executive committees) until new elections are called. However, this merely means that there may be a period when a delegate is member of an organ of state power which has ceased to exist, or has not yet been formed, i.e. there are delegates while there is no representative body, or in other words there are already delegates, whereas the representative body is still non-existent. Clause (5) Sec. 18 of the Constitution of the Hungarian People's Republic decrees that the Presidential Council of the People's Republic has to convene the elected National Assembly within a month following upon the election.[28] During this term there are already elected delegates, still there is no National Assembly. (A similar situation exists in respect of the councils in the period between elections, the presentation of the mandate and the first session of the council.)

[28] Section 55 of the Constitution of the Soviet Union has fixed this term with three months (similarly also Section 39 of the constitution of the Russian Federation, the constitutions of the union and autonomous republics, Section 46 of the Rumanian Socialist Republic, Section 60 of the constitution of the Albanian People's Republic); on the other hand Article 17 of the Constitution of the People's Republic of Poland stipulates one month.

Sections from 3 to 6 of the standing orders of National Assembly define the first functions of the constituent assembly. These are as follows: (a) the session is opened by the President of the Presidential Council of the People's Republic; (b) the chair is then taken over by the chairman by seniority; (c) election of the mandates committee; (d) scrutiny of the mandates of the members of the mandates committee; (e) resolution in the matter of mandates; (f) election of the dignitaries of the House. Essentially the same procedure is followed in the first section on the first session of the councils. (Similar provisions have been taken up in the standing orders of the Bulgarian, Rumanian, and German legislatures.) At which act may now the National Assembly be considered constituted? Two moments offer themselves, viz. the opening of the session itself by the President of the Presidential Council of the People's Republic, or the electoral act following upon the verification of the mandates. In our opinion the National Assembly may be considered constituted with the act of opening. From this moment the National Assembly discusses business and passes resolutions in a collegiate form. A resolution of this sort is e.g. the election of the mandates committee, naturally before the verification of the mandates. And we have to presume that only a properly constituted representative organ of state power can perform acts of state power. The election of the mandates committee is beyond doubt an act coming withing this category. In this case we shall have to insist upon the position we have taken earlier, viz. that a non-verified mandate is null and void *ex tunc*. Referred to this problem, the composition of the National Assembly, its personal status, must be regarded as such as it has become after, and as the outcome of, the scrutiny of the mandates *ex tunc*.

After the beginning of the functions of the supreme and local representative organs and their members has been established, there remains to determine the final date of their term. This is somewhat easier, because, most of the socialist suffrage laws define the date of the termination of the mandate with accuracy. So Sec. 57 of the Hungarian Act III of 1966 provides that the mandate of the representatives of the National Assembly and the council members shall cease with the expiry of that of representative organs, the announcement of incompatibility, recall, resignation, the loss of eligibility, and the death of the representative or council member. However,

the mandate of the council members must be deemed terminated also when, owing to the changes in the territorial division, the council ceases to exist.

In several socialist countries, mostly on the part of the members of local agencies, the somewhat justifiable wish has been expressed that the statutory provisions in force should be amended so as to extend the mandate of the council members to the date of the formation of the new council. As a matter of fact, in this case the functions of the council would come to an end, but not that of the committees and delegates. The arguments brought forward in favour of this amendment are sufficiently conclusive and correct (e.g. the fact that as a consequence a refreshing influence on the work of the committees and delegates is expectable etc.).

In general all other instances of a termination of the mandate of the delegates present no problems and are settled on the whole in a uniform manner in the socialist countries. So the Hungarian regulation laid down in Section 57 of Act III of 1966 agrees almost wholly with the enumeration in Clause 1, Sec. 73 of the Polish Act of October 27, 1957 on the election of people's councils (death, resignation, deprival by the people's council, recall, and changes in the territorial division) when what has been mentioned in the previous section is taken into consideration. Some of the causes of the termination of a mandate (deprival, recall) have already been dealt with. In connexion with the resignation there are problems which have to be clarified.

A closer analysis of the act of election will bring to light that in Hungary it consists of a number of factors of will: the nomination by the Popular Front, the resolution of the nominating meetings, the acceptance of nomination by the candidate (i.e. his declaration that, in case of being elected, he will undertake the functions and obligations of a representative), and finally the majority declaration of will of the electors. Of these three factors, however, only the latter two are closely associated with the election of the delegate. No person can become a member of a representative agency of state power unless (a) he has agreed to his nomination and consequently to his election; and (b) at least one half of the constituents have cast their votes for him or, in the event of proportional elections, for the list on which the name of the person has been entered. Election as an act of constitutional law takes place in the form of a unanimous

manifestation of will of both the constituent (or the specified percentage of them) and the candidate.[29] Can a legal relation under constitutional law so created be terminated by a unilateral act of the delegate? It is a fairly general opinion of the constitutional law and the discipline of constitutional law of the socialist countries that the ties between the delegate and his constituents on the one part, and those between the delegate and the representative organ of state power on the other cannot be dissolved by a unilateral act of the elected delegate. Since, however, the consultation of the electorate would involve a large amount of organizational work, the representative agency of state power should be endowed with the right to decide on the request of the delegate, whether or not he should be relieved of his duties. Section 73 of the Polish Act of 1957 on the people's councils decrees the obligation of the people's council not only in the event of resignation, but also when the other two conditions exist, to establish their occurrence by an official act. This is partly more, partly less than what has been said above. As a matter of fact, this is a case merely of the establishment (*otwierdza*) of the cancellation of the mandate, and not of some sort of a decision. Hungarian literature of constitutional law goes beyond this, when it is pronounced that "resignation will become effective only when the National Assembly has taken notice of it."[30] That this does not take place automatically is manifest from what János Beér holds, viz. that a procedure of recall or incompatibility can be continued irrespective of the resignation. It follows therefore that resignation is by itself not an act terminating a legal relationship, and is not even valid unless in conjunction with the act or resolution of acknowledgement of the representative organ of state power concerned.

The expiry of the term of the operation of the representative agencies of state power causes no particular problems. The legislations of the socialist States draw a line between the rules of termination

[29] The necessity of a declaration of consent of the candidate is decreed in most of the socialist franchise laws, so Section 61 of the decree-law of January 9 1950 of the USSR; Section 54 of the decree-law of December 11, 1950 of the Russian Federation; and Section 83 of the decree-law of 1951, amended in 1954, of the Soviet Union on the election of the frontier zone, regional district, municipal, rural and settlement soviets.

[30] Beér, Kovács and Szamel, *Op. cit.*, p. 296.

of the supreme organs and those of the local organs of state power. In the Hungarian People's Republic, e.g., the Constitution declares that the National Assembly should be dissolved in general on the expiry of a term of four years (clause (1) Sec. 11 of the Constitution), however, the National Assembly may declare its dissolution even before the expiry of the mandate (clause (1) Sec. 18 of the Constitution), and in case of war or in the event of emergency it may extend its mandate (clauses (2) and (3) Sec. 18 of the Constitution). No other organ may decide on the dissolution of the National Assembly yet as the fully qualified embodiment of popular sovereignty it may decree its dissolution before the expiry of the term, unconditionally, or extend its term in the event of the existence of the specified conditions, viz. war or emergency. Here as a matter of course the supreme representative organ of state power is in a monopolistic position.

The situation is an altogether different one at the local representative agencies of state power. It is characteristic of this level of the organs of state power that the councils themselves cannot decide either on their dissolution before the expiry of their term, or on the extension of their mandate. On the other hand, beyond the general statutory provisions, in conformity with which the councils are elected for the same four-year term as the National Assembly, under clause (2) Sec. 30 of the Constitution the Presidential council of the People's Republic of Hungary may by its act terminate the operation of a council for two reasons. These are (a) the right of the Presidential council laid down in the Constitution by which it may dissolve any council whose "functioning is in conflict with the Constitution or constitutes a grave risk to the interests of the working people" (clause (3) Sec. 19); in conformity with Sec. 70 of the constitution of the Bulgarian People's Republic the people's councils of higher degree may dissolve those of lower degree; and (b) the provision of para (g) clause (2) Sec. 4 of Act X of 1954, based on clause (2) Sec. 29 of the Constitution according to which the Presidential Council of the People's Republic of Hungary may change the boundaries of a community law when this change implies the termination of the functions of the council. While in the supreme organ of state power, within constitutional and statutory limitations, the own will predominates at the termination of its operation, for the local representative agencies of state power it is the central organ (or more accurately, a single

organ of state power, viz. the Presidential Council of the People's Republic) that decides and here the local organ has no function whatever.

At this point a problem will have to be dealt vith, viz. the safeguard of the rights of the delegates. The special position of the representative organs of state power in the socialist State acquires the safeguard of the operation of these organs. And this manifests itself undoubtedly in the safeguard of the rights of the delegates. Other organs of the socialist State have also claims to a definite safeguard of their interests. So e.g. certain provisions of the Criminal Code punishes criminal acts committed to the prejudice of official persons (violence against official persons, issulting an officer of the law, etc.). However, protection of a yet higher degree is given to the representative organs of state power. In fact their members are the direct representatives of the working people. By setting aside the express means of criminal law which are due the council members acting in their official capacity and of the representative of the National Assembly as well as of the employees of public administration or the judiciary or the procurator's offices in the socialist countries, it may be said that the safeguard of the rights of the representative organs of state power is realized by way of the immunity due the members of these organs. Some of the means of minor importance, such as the guarantee given to the delegates of a participation in the work of the representative organ,[31] their fees, free travelling ticket, have been introduced in all socialist countries.[32] The situation is a similar one with the most characteristic institution, viz. immunity.

[31] Cf. Clause (3) Sec. 25 Act X of 1954 of Hungary; Section 49 of the Polish Act No. 16 of 1958 on people's councils; Article 5 of the standing orders (1 March 1957) of the Polish Seym, on the freedom of the delegates; clause (1) Sec. 17 of the Czechoslovak Act No. 69 of 1967 on the national committees.

[32] In the legislation of the socialist countries this problem is of importance because the delegates are not career politicians, and most of them continue their earlier occupations even after the election. Only in the Polish regulation there is reference to a temporary leave which may be granted to the delegate by his employers. It is characteristic that according to the textbook of Soviet constitutional law of 1938 — Советское государственное право. Учебник для юридических институтов (Soviet Constitutional law. Textbook for the Institutes of Law), edited by A. Ya. Vishinski, Moscow 1938—and since then according to practically all textbooks, "the delegate to the supreme soviet is not a career politician, nor a legislator by profession, but a person closely

This institution is of utmost importance for the subject-matter of the present work. As for the historial backround here it should suffice to mention that immunity is a concomitant phenomenon of bourgeois parliamentarism and that essentially it has come to life in two forms. By immunity Hungarian bourgeois public law understood the institution which protected the members of the Parliament against being called to account for their acts in this capacity, or for their conduct in Parliament, by any other organ. Inviolability guaranteed that a member could not be taken into custody, nor could criminal proceedings be instituted against him for acts committed not in his capacity of a member unless with the approval of the Parliament. Two traits are characteristic of socialist constitutional law, viz. that (a) in general it recognizes inviolability only, and that (b) in a number of countries this institution has been extended also to the local organs of state power.

The Constitution of the Soviet Union of 1936 and the constitutions of the union and autonomous republics define immunity (inviolability) uniformly: "No delegate of the Supreme Soviet of the USSR can be called to account by way of judicial proceedings or taken into custody unless by consent of the Supreme Soviet of the USSR, or, between the sessions of the Supreme Soviet, by consent of the Presidium of the Supreme Soviet of the USSR (Sec. 52 of the Constitution of the Soviet Union)." The same form has been accepted by the Hungarian (clause (2) Sec. 11), the Polish (clause (3) Article 16), the Albanian (Sec. 49), the Rumanian (Section 61), and the Czechoslovak constitutions (Article 58).[33] As regards the Yugoslav constitution, here Section 202 deals with both the institutions of immunity and inviolability. The latter authorizes the arrest of a member and the subsequent suspension of immunity when the member was caught in the very act of committing a criminal offence for which the law prescribes a penalty of more than five years of hard jail. Section 29 of the Bulgarian constitution is rather interesting as it recognizes

associated with socialist production and science (*op. cit.*, p. 330). For that matter this is the position taken by Hungarian constitutional law. Yugoslav theory professes special views in particular as far as the representative agencies of the republics as well as the federal one are concerned.

[33] Under the Hungarian and Albanian constitutions cases of *flagrante delicto* are exempted.

the institution of immunity in its relation to the safeguard of the freedom of speech and voting in the National Assembly.

The legislation of several socialist countries has extended immunity also to the members of the local representative organs of state power. So e.g. Sec. 68 of the Act of the Russian Federation of rural and settlement soviets; Sec. 25 of the Albanian Act of November 28, 1953, on the people's councils (except cases of *flagrante delicto*); clause (2) Sec. 23 of the Act of January 17, 1957 of the German Democratic Republic on the local organs of state power (it refers to immunity, but affords no protection against criminal libel). According to Article 48 of the Polish Act of 1958 on people's councils the council member "enjoys complete legal protection in the course of the exercise of his mandate". However, a detailed exposition of this rule cannot be found in the statutory provisions and from the formulation the conclusion may be drawn that there is no case of the institution of immunity here. Hungarian constitutional law does not recognize the immunity of council members.

There remain still a few details of immunity which call for an explanation. In the socialist State immunity is a subjective right of the delagates,[34] and not that of the organ in question, as bourgeois public law pretends it. Immunity is granted in order that the delegates might perform their functions free of molestation or unlawful influencing. This will at the same time mean that although immunity is a right of the delegates, it has an influence on the sound and constitutional operation of the representative organs of state power. Immunity is not some sort of an abstract right. In fact the representative organs of state power do not grant immunity in general against criminal procedure, but stave off molestation. The organs establish whether there is a risk of molestation, and when this is not likely, in general they suspend the immunity of the delegate. In the majority of the socialist States immunity extends exclusively to inviolability,

[34] In this matter we agree with Antal Ádám, and also with János Beér. Cf. Antal Ádám, Az országgyűlési képviselők mentelmi joga (Immunity of the representatives of the National Assembly), *Jogtudományi Közlöny* 1957, Nos 1–3, Beér, Kovács and Szamel, *Op. cit.*, p. 291. — Umanski wants to discover the most important guarantee of the unmolested functioning of the delegates in immunity. Cf. *Советское государственное право* (Soviet constitutional law), Moscow 1959, 0. 280.

because this type of immunity does not grant absolute exemption from criminal procedure, as opposed to immunity, which does not permit the continuation of criminal procedure on account of statements made or acts committed by the member in his capacity of a representative. Socialist law does not guarantee such benefits to the delegate. In fact a delegate has to meet higher standards of morality than the average citizen. It would not be the proper course to exempt the delegate from the effects of any criminal act committed by him. As has already been pointed out the constitutional law of the socialist States, in the one form or the other, recognizes the disciplinary responsibility of the delegate still it would be by no means correct and desirable on the ground of legality to reduce the liability of the delegate under criminal law to mere disciplinary liability. On the other hand immunity in its form of inviolability does not protect the delegate only, but also the representative body of which he is a member. Therefore, notwithstanding the fact that immunity is a subjective right of the delegate, the member of the representative organ of state power cannot forgo this safeguard. He is bound to have recourse to it whenever criminal procedure is instituted against him, or there is a risk of his being arrested. The suspension of immunity is the exclusive privilege of the organ of state power (in the event of the supreme organ of state power, of the substituting collegiate organ). It is by this way that the subjective right of the delegate is intertwined with the procedural right and obligation of the representative organ.

5. MUTUAL RELATIONS OF THE REPRESENTATIVE ORGANS OF STATE POWER

The presentation of the representative system would be incomplete if we omitted an analysis of the relationship interlinking the different organs and agencies and brought under statutory regulation. In this analysis we have to refer to the statements made in Section 6 of the previous chapter, the general conclusions of which we propose to make use of also in this connexion.

The regulation of the competence or sphere of action of the representative organ of state power is an act of constitutional legis-

lation (as has been pointed out the regulation of the 'exclusive competence' is a normative act of the National Assembly or the Presidium of the People's Republic, i.e. a law or a decree-law). In our opinion exclusive competence cannot be sub-delegation, and cannot be withdrawn even by the governmental organs of higher order. This is the firmest basis of the operation of the given representative organ of state power. There are also other functions which come within the competence of the representative organs of state power, and which cannot be drawn within the sphere of exclusive competence; and it would not be correct to do so. The provisions of the superior organs of state power again and again impose new functions on the organs of lower order. Here we have in mind laws, law-decrees, regulations; still at the same time also the decisions of the superior councils.

Hence the statement may be advanced that the hierarchy of the representative organs of state power, i.e. the exclusive relationship of sub- and superordination of these organs, has become established in most of the people's democracies since 1954. Earlier the substitutive authority of public administration organs of general competence blurred the rather essential and fundamental principles (which had prevailed in the legislation of the Soviet Union) that the elected organs of state power embodying popular sovereignty cannot be subordinated to administrative agencies, and therefore no substitutive authority can be conferred on the executive committees. Since then this principle has been integrated into the constitutions, or the law governing local organs, of every socialist country. The principle is particularly manifest in the right of supervision. In all socialist States the method has been adopted to entrust the superior organ of State power with the supervision of the local agencies, and on the highest level, the supreme representative organ of state power, or its substitutive organ.[35]

The most clear-cut formulation of this right is that taken up in clause (3) of the Preamble of the Hungarian Councils Act. "In confor-

[35] Sections 3–4 of Hungarian Act X of 1954; clause 1, Section 63 of Polish Act No. 16 of 1958; Sections 17–18 of the Bulgarian Act of November 2, 1951; Section 10 of the Rumanian Act of Dec. 28, 1968; Section 1 of the Act of September 20, 1961 of the German Democratic Republic.—An exception is the Act of the Czechoslovak Socialist Republic, where at drafting the Act of 1960 on the national committees the assumption was that there was no essen-

mity with our Constitution the councils are subordinate . . . exclusively to the superior organs of state power." How, then, shall we interpret the provision of clause (3) Sec. 31 of the Constitution that the decrees and regulations of the councils "cannot conflict with the regulations . . . of the Council of Ministers and of the ministries"? This statement has to be clarified for the very reason because the actual governmental practice has not drawn the necessary conclusions from the quoted passage of the Councils Act.

The citizens as well as the governmental organs are bound by the regulations of the administrative agencies (so of the Government and the ministries) promulgated within their competence. Consequently the administrative regulations promulgated by the Government within the sphere of its general competence, and so also those of the ministries within the sphere of their specialized competences constitute legally regulated scopes also for the local organs of state power. Since questions so settled cannot be regulated locally in a manner differing from the regulation of a national organ having competency, the provision in clause (3) Sec. 31 of the Constitution needs no further explanation.

On the other hand, the Constitution and the Councils Act have made the exercise of supervision of the representative organs of lower order the exclusive right of the similar organs of higher order, so that the latter are entitled to declare null and void or amend provisions infringing the rule of law. When this question is analyzed in all its details, it will be inferred that the Hungarian statutory provisions and mostly the laws of other socialist countries put up barriers to the administrative agencies on two grounds, viz. (a) the administrative agencies cannot define the competence of the representative organs of state power, they cannot confer on their subordinate administrative agencies a competence that comes within the statutory

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tial difference between state power and the practice of public administration. (Cf. Karel Bertelmann, Eine neue Etappe in der Entwicklung der Nationalausschüsse der Tschechoslowakischen Sozialistischen Republik, *Staat und Recht 1961*, No. 2, p. 249.) The new Czechoslovak constitution speaks of the national committees as the "organs of state power and public administration" (Section 86) and in conformity with the Act on the National Committees (Section 69, Act No. 69 of 1967) their activities "are directed and supervised by the Government".

competence of the local agencies of state power, the councils; and (b) the administrative agencies cannot bring normative Acts which would affect subjects within the competence of the organs of state power, in particular within the statutory exclusive competence of these organs.

The provision included in clause (3) Sec. 31 of the Constitution quoted above can in no circumstances be construed so as if all normative Acts of the central administrative agencies modified the competence of the local agencies of state power. An interpretation in this sense would violate a principle of law, viz. the primacy of the organs of state power in the socialist State. Any regulation which would entrust the administrative organs, and in particular the central specialized agencies of public administration, with the definition of the competence of the councils would in addition infringe the principle of socialist democratism, and at the same time the Constitution. The unambiguous wording of the Constitution as well as the Preamble to Act X of 1954 have to be interpreted strictly.

Even so, it would be extremely useful also for the administrative organs of the councils, as far as the competences of the authorities are concerned, to have a formulation of the exclusive competence of the representative organs of state power in a uniform legal rule.

CHAPTER FOUR

LEGAL ACTS OF THE REPRESENTATIVE ORGANS OF STATE POWER

1. EFFECTIVE COMPETENCE OF THE REPRESENTATIVE ORGANS OF STATE POWER. FORMS OF THEIR ACTS

In a socialist State the representative organs of state power, by a so to say general division of labour, display their activities in two principal directions, viz. in the creation of compulsory legal Acts and in the supervision of enforcement (hereincluded any organizational activity associated with this supervision). At the same time it is exactly the council system that provides an example demonstrating how in the socialist governmental mechanism, organically and inseparably, legislation and enforcement are intertwined; how certain smaller groups of the representative organs of state power (here we have in mind not only the executive committees, but the permanent and provisional committees of the councils which have come into being in some of the socialist countries of late) have become partly the drafters of legislation (in the case of the executive committee even legislators), partly the organizers of enforcement. Hence when surveyed from this aspect, the local representative organs of state power will reflect the unity of state power. While in the supreme organs of state power the differentiation of the functions has become widespread also in the socialist States and the unity of state power is guaranted by the priority, or absolute superordination, we may say power monopoly, of the supreme representative organ of state power, on the local level we have the by far less differentiated organization mentioned earlier. This form of a division of labour has become imperative, owing to the basic principles of operations of the socialist State. The large membership and the forms of operation make the organs of the state power, created for the expression of popular sovereignty, unsuitable to perform direct functions of enforcement in their plenary meetings. Therefore, a network of the executive (and dispositive) organs is operating, together with a number of collective

bodies of limited membership, parts of the representative organs of state power, and agencies formed of their members (e.g. the Presidential Council of the People's Republic, the executive committees of the councils, further the permanent and provisional committees).

The legally relevant Acts of the representative organs of state power do not present a uniform picture. There are enormous differences here in particular as regards the subject-matters of the Acts. These organs may display their activities in the field of economy (national or local plan, the budget), where large numbers of organizational problems of detail have to be settled, or for the solution of cultural problems (e.g. the reform of public education), for the organization of certain agencies (the election of the government or the executive committee). Besides, the Acts of the representative organs may be directed to the enforcement of the rules of conduct binding the governmental agencies and the citizens, the prohibition and prosecution of socially noxious conducts, tacit or express approval of the legal rules enacted by other agencies, etc. There is an abundance of legal Acts of the representative organs of state power. The legal Acts of the representative organs of state power in a given State may be compiled by their subject-matters, when the actually exercised authority of these organs comes in sight. We may then easily recognize the rights of which the organ in question is making actual use within the scope delimited by legal norms. The legal Acts of the organs of state power, in a similar way as those of other agencies, reflect the actually exercised competences only, and not all of them. An analysis of the legal Acts, and in the first place, of the normative Acts, may simultaneously produce benefits in the field of theory and direct practice, in particular because an opportunity will present itself by this way for a differentiation of the Acts on policy-making considerations (*de lege ferenda*), and also for a clarification of the competences. As has been mentioned, so far this clarification of competences has not been solved in the socialist States by either jurisprudence or legislation.

As regards the legal acts of the representative organs of state power of the Hungarian People's Republic, the statement may be advanced that, notwithstanding their great variety, no clear-cut boundary line can be drawn here according as these Acts are of a singular or general nature, or are normative, or in reality void of any rule of conduct.

In fact, the differentiation of the legal Acts of the organs here discussed does not rely on this principle. Among the Acts of the National Assembly a statute might as well be a solemn declaration including no normative rule, as a provision equally binding both the citizens and the governmental agencies, or only the latter. The same is inferred from the resolutions of the councils on a closer scrutiny. This is what will have to be analyzed in the first place, concerning the legal Acts of the representative organs of state power.[1]

Hungarian law, as in force at present, recognizes the following legal Acts of the representative organs of state power: as regards the National Assembly Laws or Acts (para (a), clause (3) Section 10 of the Constitution), the Resolutions of the National Assembly (Section 45 of the Standing Orders of the National Assembly of 1956). As regards the local councils, By-laws (clause (3) Section 31 of the Constitution) and Decisions (to these clause (4) Section 31 of the Constitution refers, whereas a detailed definition of the decisions is given in Section 8 Act X of 1954). However, in the background of the four principal types there looms a fairly comprehensive set of legal Acts.—In the Soviet Union, according to actual—on the whole general—position taken by the discipline of constitutional law, the supreme soviets (all-Union, and those of the union and autonomous republics) can pass normative Acts only in the form of Laws (*zakon*). No other Acts of these organs such as Resolutions (*postanovleniye*), Declarations (*zayavleniye*, *deklaratsiya*), Appeals (*obrastcheniye*) can contain normative rules.[2] The soviets of the deputies of the workers pass Resolutions, issue Decrees (*resheniye*, or *rasporyazheniye*).[3] In matters coming within the exclusive competence of the soviets, such

[1] In line with the purpose of this study, our investigations extend only to the directly elected representative organs of state power, and not to the Presidential Council of the People's Republic and to similar organs of the socialist countries. As regards the legal Acts of the Presidential Council of the People's Republic cf. the monograph of Antal Ádám, *A Népköztársaság Elnöki Tanácsa* (The Presidential Council of the People's Republic), Budapest 1959, in particular pp. 87–124. His views can substantially be agreed on.

[2] Cf. Ya. N. Umanski *Советское государственное право* (Soviet constitutional law), Moscow 1959, pp. 272 and 273.

[3] Cf. Article 6 Act of July 18, 1968 of the Russian Federation on rural and settlement soviets.

as the budget, national plan, establishment of council departments, election of the executive committees, etc. the council passes Resolutions.[4] In the People's Republic of Poland the Seym enacts Laws and Resolutions, whereas the people's councils issue Binding Resolutions. In the Czechoslovak Socialist Republic the National Assembly promulgates Laws, Resolutions, Declarations, etc., the national committees Resolutions, Binding Decisions and Decrees; in Yugoslavia the Federal *Skupshtina* passes Laws, Resolutions, and Declarations, the communal *skupshtinas*, By-laws and Decisions. In the Rumanian Socialist Republic the Great National Assembly enacts Laws and Resolutions, the people's councils Decisions; in the People's Republic of Albania the Popular Assembly promulgates Laws and Resolutions, the people's councils Resolutions and Decrees, etc.

The wide range of the forms of the legal Acts is thus characteristic of the operation of the representative organs of state power also in other people's democracies. As for the various regulations even in the presence of similar traits there are marked differences among them. For the purpose of a theoretical discussion, we have taken as starting point the statutory regulations as they exist in Hungary. As regards the legal Acts of the representative organs of state power, the following principal problems emerge in the Hungarian socialist discipline of constitutional law: (i) the singular forms of legislation, such as the constitution (and in conjunction with it the problems of constitutionalism); (ii)the fundamental laws, the legality (the observance of the rule of the law); (iii) the subject-matters and the competence of legislation; the normative and non-normative resolutions of the National Assembly; the standing orders; (iv) the local council decrees; the normative resolutions of the local councils; non-normative resolutions of the local councils; further, the position of the legal Acts of the local councils in the event of conflicts.

2. CONSTITUTION AND CONSTITUTIONALISM

The Hungarian National Assembly, as the supreme organ of state power, in conformity with the Constitution (clauses (3) and (4) of Sec. 10) enacts Laws—clause (a); and passes other legally relevant

[4] Ya. N. Umanski, *Op. cit.*, p. 328.

Acts (it establishes the state budget, draws up the national plan, elects the Presidential Council of the People's Republic, the Council of Ministers, creates and dissolves ministries, defines and modifies the competence of the ministries, decides in the matter of war and peace, and grants general amnesty)—clauses from (b) to (h). The context suggests as if the subjects enumerated in clauses from (b) to (h) were not legislative ones and ought to appear in some other form of legal Act. To the latter statement there is but reference in clause (2) Sec. 15 of the Constitution, where all Acts of the National Assembly are, by a collective designation, called Resolutions. However, in reality apart from clause (a) some of the Acts enumerated in this Section may also be passed in the form of Law, at least there are no obstacles whatever to Laws being enacted for their regulation. These are the following: the budget, the plan of the people's economy, the organization and dissolution of ministries, the definition and change of their scope of activities,[5] the declaration of war and the signature of the peace treaty (to this the relevant practice of the socialist countries points) and the granting of general amnesty. There remain the non-normative Acts in connexion with the election of the various agencies. After such an analysis, from the enumeration in clause (3) Sec. 10 of the Constitution, it may appear as if it decreed to promulgate all normative Acts in the form of Laws, and listed the special, non-normative Acts in the notional sphere of Resolutions. However, the parliamentary practice departs even from this conclusion, and by way of exception it permits the promulgation of Resolutions also for normative purposes. The first statutory manifestation of this practice is itself a Resolution of the National Assembly, i.e., Resolution No. 1 of 1956 on the operation of the National Assembly and the representatives. Section 6, Chapter V declares that "the Resolution passed on the operations of the National Assembly and of the representatives, further the simultaneously approved Standing Order, have to be published in the official gazette", because of their normative character. To the same also Sec. 45 of the Statutes of the National Assembly quoted earlier refers. The Constitution itself

[5] The legislative character of this function is confirmed by Sec. 24 of the Hungarian Constitution, which was taken up in it by virtue of Act II of 1957.

does not draw a clear-cut line between the Acts passed in the form of Statutes and those having the form of a Resolution.

It is of interest to note here that a relatively recent socialist Constitution, that of the Czechoslovak Socialist Republic, too, fails to create an unambiguous position in this respect. This Constitution refrains from naming the legal Acts which may be promulgated beyond the Constitution and other Laws (Article 41), such as the decisions on home and foreign policy, the long-term development plans of the people's economy, the budget, the supervision of their performance, the debate on the government's report, the voidance of unlawful or unconstitutional resolutions of the agencies of lower order, the election and recall of the President of the Republic and of the Supreme Court, the declaration of war (Articles 41, 43, 46 and 49). Essentially this is the situation also in the other socialist countries. Hence the statement that the socialist constitutions have routed to the regular legislative channel the definition of the system of—strictly speaking—non-legislative Acts admits of no generalization. Moreover, in certain cases only the practice of the supreme representative organ of state power has defined the system of designation or differentiation of these legal Acts.

The order, or practice of legislation of the Hungarian National Assembly distinguishes between Laws (and within these the Constitution) and Resolutions of the National Assembly. The Constitution mentions the Constitution itself, as a fundamental statute law among the statute laws. This may be inferred from the fact that in the enumeration of subject-matters coming within the competence of the National Assembly the Constitution does not mention the giving of a constitution or a constitutional charter separately, for obviously it classifies it as coming within the notion of legislation. Incidentally the Constitution itself refers to the problems of a constitution at several places. Even though we ignore here the sections which affect the provisions infringing the Constitution, we have nevertheless have to refer to clause (3) Sec. 15 of the Constitution, which lays down the special procedure to be followed at the amendment of the Constitution, and Sec. 70 which confirms the binding force of the Constitution. (As a matter of fact the Constitution of the Soviet Union of 1936 operates on the same lines, only here additional problems exhibit in Article 16, emerging from the federal character of the country.)

In the legislative regulation of socialist countries the constitution may be distinguished from other laws only by external marks at first glance. The procedure of the introduction of a constitution and its amendment differ from other legislations. In the constitutional law of the socialist countries, the requirement of a quorum is not exclusively restricted to the amendment of the constitution. For example, Sec. 33 of the Bulgarian Constitution specifies the presence of more than one half of the total number of delegates for the election of the presidium of the Popular Assembly, the Czechoslovak Constitution decrees the approval of three-fifths of the representatives for the declaration of war, the modification of the state frontiers and the election of the President of the Republic. Socialist constitutional law, when it comes to discuss the constitutional charter, beyond the formal difference emphasizes also the characteristics of the content. The constitution is a fundamental statute law which, with its norms, predetermines the operation of the agencies of the given State and legislation. No other legal Act can be in conflict with the provisions of the constitution. The constitution, as a fundamental statue law is positioned on the summit of the hierarchical order of the sources of the law. However, this does not alter the case that the constitution is in fact a law, whose legal function cannot be thrust to the background in the face of its political role. Its political and legal significance uniformly confirms its character of a fundamental statute law.[6] In addition to the statutory character of the constitution, its nature of a fundamental statute law calls for a closer examination. Hence the question is what makes the constitution a special statute law in the political-legal sense, and what are the consequences of this.

The Diet or National Assembly, the supreme representative organ of state power in each socialist country, is the expression of the fulness of sovereignty and no other organ, not even the Diet itself, can permanently restrict it in the expression or exercise of the sovereign rights. The statutory delegation of authoritative rights is in all cases provisional only. The supreme organ of state power is the only governmental organ in the socialist countries, which may absorb the compe-

[6] This problem of extreme significance for legislation has been discussed and clarified by Imre Szabó. Cf. Az alkotmány helye népi demokratikus jogrendszerünkben (The place of the Constitution in our popular democratic system of law), *Jogtudományi Közlöny 1959*, Nos 10–1, pp. 500–2.

tence of any other organ and at any time. A statutory delegation is conceivable only on such understanding. The withdrawal of a competence is effected by the Act, by a simple legislative Act, of the supreme organ of state power.

As for the Constitution the same fundamental statement has to be made. Obviously the supreme representative organ of state power cannot restrict its own activities definitively, not even by statutory provisions of the Constitution itself. This is barred by the method of the creation of this organ, i.e. by the fact that at definite terms the sovereign people itself transfers the fulness of its power, without any limitations, to the elected supreme representative organ. Still the constitution embodies a more sustained and solid form of self-restraint — inasmuch as any change of it requires an appropriate form. The proclamation of a qualified majority (quorum) by itself makes an amendment of the constitution a complex procedure. Still most of the constitutions contain further express or implied restrictive provisions. Here we should like to refer to Article 31 of the Constitution of 1936 of the Soviet Union which transfers all (all-Union) rights enumerated in Article 14 to the competence of the Supreme Soviet of the Soviet Union, provided that these have not been assigned by the Constitution itself expressly to the Presidium of the Supreme Soviet, the Council of Ministers of the Soviet Union, or to any of the ministers (Article 23 of the Constitution of the Russian Federation and Article 22 of the Constitution of the Ukraine provide in the same manner). Section 15 of the Constitution of the People's Republic of Bulgaria among others declares: "Within the framework of the Constitution the Popular Assembly is the depositary of the full state power provided that in the sense of the Constitution certain functions do not come within the competence of other organs subordinate to state power, or the competence of public administration." Even if not expressly, still by implication there are special rights reserved for other organs under the Constitution of the Hungarian People's Republic (such are certain functions assigned to the Presidential Council by virtue of clause (1) Sec. 20 of the Constitution, in particular those mentioned in paragraphs, d, f, g, h, i and j). However, while under the Hungarian Constitution the National Assembly may at any time withdraw rights reserved for another organ, in the Soviet Union or Bulgaria this can be done only by way of an amendment of the Constitution.

This form of a solution is rather characteristic of a constitutional regulation where the self-restraint of the supreme representative organs of state power, the organ symbolizing and at the same time embodying sovereignty, is of greater strength in comparison with any other statutory regulation, and may almost be termed as permanent.

Hence two traits in the constitutional charter departing from a statute law are given: the guarantee of its stability by stipulating a qualified majority (quorum) for the amendment of the constitution (this is considered a formal difference, although at the differentiation which is to follow also its difference of content will come into prominance) and the self-restrictive character (although theoretically this cannot be absolute). The constitution has a characteristic trait which even more emphasizes the significance of the constitutional charter, namely that in the constitution we may find the most important subject-matters affected by legislation. While all other laws, or legal norms only affect a relatively narrow sector of the problems brought under legal regulation by the State, it is characteristic of socialist constitutions that the problems brought under regulation bear a general and comprehensive nature. By a general nature of the Constitution it is understood that it incorporates norms for all vital matters of the State and socialist society. According to the latest Soviet textbook on constitutional law, i.e. Umanski's Soviet Constitutional Law, the constitution embraces the principles of social and governmental construction, the principles of the organization and activities of the Soviet governmental organs, the rights and duties of the citizens, and the electoral system.[7]—When an attempt is made at a detailed enumeration of the subjects taken up into the constitutional charter, then in general the following items may be discovered in the constitutions of the socialist States: the principle and the principal forms of the realization of popular sovereignty, the political and economic foundations of society (social order), the forms of leadership of State and society, the rights and duties of the citizens, the most important central and local organs of the State (representative organs of state power, the agencies of public administration, the judiciary and the procurator's offices), the principles of their organization and oper-

[7] Ya. N. Umanski, *Op. cit.*, p. 37.

ation, the most important legal Acts, the electoral system, the principles of the territorial division of the State, the insignia, and the procedure of the amendment of the constitution. In addition to these items, certain other principles, such as those of the administration of justice, etc., have also been defined by the fundamental statute law in most of the socialist countries. At the same time the constitution does not deal with these problems in detail, but only in their principal traits, in a manner more generalized than would ordinary legislative Acts. Socialist constitutions do not contain a codification of the particular groups of problems, or go into the minutest details. There is not a single subject matter of legislation in the constitutions which would not call for a regulation of greater detail, or the issue of implementing decrees. Metaphorically the constitutions survey the whole sphere of society or the State, still only from a bird's eye view, they bring under regulation the social and political conditions, however, only in their principles, but never in detail. This nature of the socialist constitution distinguishes it from the technique of the statute laws, in particular from that of the codes. As for the statute laws or codes their sphere of regulation is relatively narrow as compared with the constitution yet they go more into the depth.

Finally, let us mention the subjects which are almost exclusively constitutional matters. In the socialist constitutions here in the first place the principle and forms of realization of popular sovereignty have to be referred to. Unless it is a case of a fictitious constitution (what socialist enactments try to avoid by all possible means), the function of the constitution, as a fundamental law, is to declare the origin of the principal political power and to define the fundamental elements of an exercise of this power. However, it cannot do so unless defining the economic foundations of society and analyzing the dominant relations of production, characteristic of the given society. The constitutional exclusiveness extends to the full powers and also self-restriction of the supreme representative organ of state power, expressing the fulness of sovereignty. By way of summing up the statement may be made that the exclusive subjects figuring in a constitution are without exception in direct association with the problem of sovereignty (or possibly its foundations or forms of realization). Therefore sovereignty, the supreme political power, is the basic question of the constitution as the fundamental law, and round these problems are

grouped all other vital problems of society and State, expressed in the form of a legal norm.[8]

After the notion of a constitution has been so distilled, by separating it from the ordinary statute laws, and an attempt has been made to demonstrate the smallest atom of a fundamental statute law, we shall now revert to the living constitution which as a matter of course contains far more than the basic question.

In the Hungarian discipline of socialist constitutional law it was János Beér who pointed out the diverse traits of, and the points of connection between, pure and transposed legal relations—norms—under constitutional law, and this remains his merit.[9] These norms are in a clearly recognizable form distinguishable in the constitutions of all socialist States. It may also be demonstrated that each thesis of the constitution, with the exception of the subjects coming exclusively within the sphere of constitutional regulation, be it a pure or transposed norm of constitutional law, calls for the issue of further implementing provisions in order to become effective. The wide sphere of regulation of the constitution is exactly due to the fact that the operation of the State has to be defined by a uniform principle beforehand. Therefore a uniform fundamental statute law brings the operation of the State under regulation, and for the enforcement of this statute law guarantees have to be created in the socialist State. The paper by Imre Szabó referred to above gives food for thought for the very reason because he sees in the elevation of the constitution to excessive heights the principal obstacle to its realization. By the fact that only the political character of the constitution is emphasized, the man in the street is prevented from recognizing in it its character of a binding norm. The unduly solemn character of the constitution, or rather the construing of such character into it, almost relieves the particular citizens of the observance of the

[8] It is not astonishing that according to Kotok the problem of sovereignty is the fundamental problem and starting point of the study of constitutional law. (Cf. V. F. Kotok, О системе советского государственного права (On the system of the discipline of constitutional law), *Советское Государственного Право. 1959*, No. 6, pp. 70 and 74.

[9] Cf. Beér, Kovács and Szamel, *Magyar államjog* (Hungarian constitutional law), Budapest 1960, p. 8.

binding rules decreed by the constitution.[10] For this very reason, besides the core of the constitution, we have to discover the coherent and indivisible political and legal character—norms—of the constitution which, be they pure or transposed, in all events imply the most important basic problems of State and society, and therefore action has to be taken for their enforcement; the governmental agencies should perform the activities required for the norms to be carried into effect with continued existence. The citizens on the other hand should consider it their duty to embrace the rules of conduct of the constitution in the same way as is the case with all other legal norms. (This cannot be thwarted by the fact that the provisions of the constitution have no direct sanctions. In fact it is the function of implementing provisions, among which we have to include also the statute laws in this case, to provide for sanctions by an indirect way.)

The constitution is the statute law of the socialist State, it is its fundamental, i.e. most important statute, law. This is the reason why its effectiveness is of importance. As has been pointed out above, this effectiveness relies in two conditions, viz. (i) the organizational norms and those of conduct promulgated by the political and social organs cannot come into conflict with those laid down in the constitution, or, in a positive form, they have to be in perfect harmony with the words and spirit of the constitution; (ii) by recognizing in it the legal rules consolidating the most important rules of conduct, the citizens have to observe all of its provisions.—It is not by mere chance that clause (2) Article 111 of the Constitution of the Czechoslovak Socialist Republic declares: "Interpretation and application of all statutory provisions have to be in harmony with the constitution."

All that has so far been said of the observance, enforcement, effectiveness of the constitution is in reality the problem of constitutionalism.

The question arises here whether the concept of constitutionalism is unambiguous; or, better formulated, all Hungarian scholars of constitutional law understand the same thing by constitutionalism. In reply to the first question anybody will define constitutionalism under socialist conditions as the obligation of observing the constitu-

[10] Imre Szabó, *Op. cit.*, p. 499.

tion. This definition is, however, not so clear-cut at the second step. The duality of the opinions on the constitution is first encountered when discussing the bourgeois historical background.

In the textbook on Hungarian constitutional law (by the joint authorship of Beér, Kovács and Szamel), on analyzing the notion of the constitution and the constitutional State, the authors approach also the notion of constitutionalism. János Beér, the author of the relevant section, comes in point of fact to the conclusion that the notion of constitutionalism is equal to that of the constitutional State, however, under the conditions of bourgeois society, it is equal to that of a progressive State, which "at least to a minimum extent, and surrounded by a minimum of legal guarantees at least, ensures the influence of the citizens on the formation of the political organs, and the management of political affairs." By this way the notion of constitutionalism receives an entirely new colour. It does not anymore adhere to some sort of a constitutional charter and ceases to mean the observance of this charter. It presupposes the presence of certain progressive doctrines in the constitution, which it is difficult to circumscribe and which are defined differently by the various authors. When now as the outcome of this trend of thought constitutionalism is removed from its normative basis, at the same time we shall come into conflict with our earlier, apparently universally approved definition.

Ultimately does the new definition rely on some sort of a substructure? May we approve the new form of definition? What effect will it have on our doctrines of constitutional law and the safeguard of constitutional institutions? Before deciding whether the doctrine so formulated is correct or incorrect, let us explore the historical core of this trend of thought first.

The attainment of constitutions, i.e. of the bourgeois constitutions, which on the European continent and in America were the first constitutional charters at the time, was the consequence and outcome of a long historical struggle. This struggle had been introduced by the literature of the Age of Enlightenment, by a literary dispute for the constitutional State (not only on the Continent but by about a century earlier in England, too). Naturally, the so-called 'constitutional' doctrines of the bourgeoisie were coming into existence before the constitutions themselves. The pamphlet literature in France,

its social projections, the *cahiers de doléance*, with almost eerie accuracy define the constitutional demands of the bourgeoisie, the petty bourgeoisie, the peasantry at that time turning into capitalists, i.e. the doctrines which these strata of society wanted to have incorporated in the nascent constitution. (In particular, at the time of revolutionary crises, the principle of the organization of state power emerged according to which in the exercise of state power, in the first place in legislation, alongside of the monarch, the citizens must be granted also a share.) It is for this reason that this age has to be considered that of the clearing up of the positions and the demands associated with the constitution rather than the age of the constitutions themselves. These viewpoints affected the constitutions only insofar as sometimes they would become the spiritual source of the constitution. When in this age Monstequieu advanced the principle of a separation and balance of the branches of state power then this principle did not become a constitutional principle simultaneously with its becoming public, but merely a constitutional political doctrine.

At the time of the great turns of the bourgeois revolutions, so in England in 1647–1649, in America in 1776, in France in 1789–1791, the proclamations or appeals (such as in England the 'Agreement of the People' 1647), and declarations approved by the legislative organs come into existence (so in America the 'Declaration of Independence', then somewhat later in France the 'Declaration of the Rights of Man and the Citizen'). These proclamations and declarations differ from any of the later constitutional charters in that they are but codifications of the often conflicting demands which the bourgeoisie had collected in literature, in the pamphlets, in the *cahiers de doléance* during more than a century. (It should be remembered that the declarations were often of a universal character, i.e. they intended to establish standards not only for the given State or society, but to define general 'constitutional' principles for all societies in being or to be. This un-statutory character will immediately be obvious on reading Section 1 of the French Declaration of 1789: "Men are born free and equal before the law. Their social differentiation can rely only on the benefit of society". It was not by chance that in the Declaration man came first, and only then the citizen. Section 16 of the Declaration spoke with even greater clarity than these examples; when claiming universal validity, it pronounced for

all States or societies in being or to be that "a society where the guarantees of rights are wanting and where a division of powers has not taken place, has no constitution", i.e. it cannot be considered a constitutional state.[11] We believe these examples throw a light on, and confirm, our earlier statement that the early constitutional declarations, contracts, etc. with their indistinct constitutional system failed to create clear-cut fundamental statutes in the actual sense, most of their rules cannot even be considered normative rules applying to a single State.

Hungarian literature of legal history, and even of constitutional law, was somewhat fascinated by the wealth of progressive ideas which in the Age of Enlightenment, and then later in the period of the bourgeois revolutions, so to say burst into the until then almost lifeless legal literature. This is by no means incomprehensible as in fact Hungarian literature on public law at that time, with its feudal-mediaeval ideas, blocked up every access to living sources. Even in the first half of the 20th century it was still almost a sacrilege to quote Rousseau, Montesquieu or Locke, and even more than that, to refer to the Jacobins. The consequence of this attitude is that even today many—having in mind a constitution, or a constitutional State—cast a glance at the most progressive ideas only, turn the pages of the most consistent works of bourgeois thinking only, and pay no heed to what has been translated into reality of all this, what has become true in the form of a statute law, i.e. to the bourgeois constitutions of the 18th, 19th and 20th centuries. And it was these constitutions and the constitutional practice developed in their wake, which meant the constitutional reality of the bourgeois State, and not the utopistic literature of the 17th century, or the radical pamphlets of the 18th century.

In part of the Hungarian socialist literature on constitutional law the concepts of constitutional State and constitutionalism have to a certain extent been equated. There are authors who consider constitutionalism the ideal and hitherto nowhere achieved state of affairs,

[11] An announcement of Robespierre in the Convention of later years is perhaps even more characteristic (May 10, 1793): "The declaration of rights is the constitution of all peoples; all other statutes, owing to their changing character, are subordinate to it." Quoted by Esmein-Nézard, *Eléments de droit constitutionnel français et comparé*, Paris 1927, Vol. I, p. 637.

in the event of whose existence the most progressive legal doctrines would have prevailed in some of the bourgeois States. In this sense no constitutionalism could come into being in any bourgeois State, not even in the age of classical capitalism as in fact it was characteristic even of the age of classical capitalism that it unlawfully thrust out the working class from the exercise of the political rights, by way of statutory property qualification, etc.

This concept of constitutionalism has to be rejected also for its unhistoricity. Primarily because in the first years of the life of the bourgeois States, at least in America and almost everywhere on the European Continent, constitutional charters were enacted, and with them the constitutional legal order was established by legal methods and means. No longer were the legal-ideological doctrines dominating. The norms laid down in the constitutions meant the order determined by the law, and constitutionalism was referred to these. This was characteristic of the State of classical capitalism. The constitutions which often followed one after the other (see the series of French constitutions, in 1791, 1793, 1795, 1799, etc.) defended the interests of the strata of the bourgeois class actually holding power, and through a certain compensation, increasingly the general interests of the bourgeoisie. Constitutionalism meant the safeguard of this constitutional system. As soon as, in the first order on the American pattern, the constitutional courts were organized, or the ordinary courts for the protection of the Constitution, these courts began to stick to the letter of the Constitution and in the course of their activities ignored all other opinions. In this age the bourgeoisie would not agree to the least open tempering of the valid constitution.

It is an altogether different matter that in the age of imperialism, and already in the decades immediately preceding it, constitutionalism together with legality began to be felt as a nuisance by the capitalistic class. In the beginning amendments of the constitutions, then new constitutional charters satisfying imperialist needs, charters extending to certain spheres only (such as e.g. the Charters of Labour in Italy and Spain) marked the path so far covered. The defeat of fascism in the war put an end to these trials, which were superseded by the practice of the 'implied powers' of the constitutional courts of the United States and the German Federal Republic. This practice in fact replaced the letter of the constitution by certain legal doctrines,

by a necessity arising "from the nature of things". However, these legal doctrines do by no means remind of the world of thought of the 17th and 18th centuries, of the ideology of enlightenment. In fact they are in keen opposition to these, being retrograde and intent on blocking the path of social progress. In the age of imperialism the legal institutions as a rule tend to become anti-constitutional, and the ramparts of constitutionalism turn into bastions of anti-constitutionalism.[12]

Hence the violation of constitutionalism in the bourgeois State did not consist in the fact that by the 19th century the bourgeoisie became unfaithful to the ideas of its youth, i.e. the ideology of the Age of Enlightenment, with all its consequences. In fact this ideal had been thrown overboard by the bourgeoisie in the first minutes of its becoming of age (in England in 1648, in France in 1791) with all its leveller traditions, Rousseau, and even Montesquieu. When all this is taken note of, and not considered a violation of the constitutions, even so there will be a plethora of cases of a true infringement of the constitution. For although during the first phase of the evolution of bourgeois society the bourgeoisie was on the alert lest the letter of the constitution should be violated openly, it could always manage to provide the bourgeois class itself, the leading layers of the bourgeoisie with means, with the aid of governmental organs, for giving such interpretation to the constitution that favoured its own ends, to the prejudice of the working class. It was in particular in the interpretation of the constitutional charters that the true sense of constitution had been distorted. The age of imperialism differed from the historical period preceding it in the anti-constitutional propaganda and political activities, i.e. the liquidation of bourgeois constitutionalism, becoming open in that period.

From the time on when in America and on the European continent the first constitutional charters were coming into existence, by constitutionalism the observance of these constitutions and the creation of

[12] In this respect the discussion of Pál Halász on the non-interchangeability of constitutionalism and democratism is rather thought-provoking.—Cf. Az államformatan néhány elméleti kérdése (A few theoretical problems of the doctrine of state forms), *Studia Iuridica auctoritate Universitatis Pécs publicata 1960*, No. 14, p. 33.

other legal norms in the spirit of these constitutions should be understood.

As regards the socialist concept of constitutionalism, when it comes to define this, our case will even be simpler than the earlier. The history of the birth and evolution of the socialist constitutions at the same time mark out the development of constitutional doctrines and principles. The socialist constitutions of necessity included, and are including, the political and legal views which under the social and economic circumstances of the given age were most progressive. New social and economic conditions always substantiated the creation of new constitutional provisions (here we should remember the Soviet constitutions of 1918, 1924, 1936, and the new constitutions of the socialist countries). By these new constitutional provisions the most advanced socialist doctrines of constitutional law are embodied. So constitutional reality and the world of legal and constitutional doctrines do not disunite, or come into conflict with each other.

However, for a definition of the concept of constitutionalism we have not to depart from the earlier: by the claim for socialist constitutionalism the obligation of the governmental, social organizations and the citizens is understood by which these are bound to observe the constitution, and to have it observed, as a normative rule, and in particular the obligation of the governmental organs to formulate the legal rules at the lower stage of the hierarchy of the sources of law in harmony with the constitution, its normative provisions, letter and spirit.

In other words, in the strict sense of the term, constitutionalism is closely related to legality. We may even say that the problem of constitutionalism has to be classified as a problem of the observance of the rule of law in a very wide sense. This statement may be advanced the easier because socialist constitutions are typically constitutional charters, whose observance requires about as rigorous means as the observance of the rule of law. These means may be discovered in the numerous branches of the supervision of legality, hereincluded not only the supervision by the procurator's offices but also the similar competence of the Presidential Council of the People's Republic, and extend to the rescission or amendment of the unlawful legal rule. This provision has been taken up in clause (2) Sec. 20 of the Hungarian Constitution, with special regard to cases of a violation of the

Constitution. As regards the practical aspect of the case, i.e. the sanction, in the matter of the preservation of constitutionalism one may without difficulty approximate the forms of how the safeguard of legality has been solved. This approach puts neither practical obstacles, nor such of principle in the way of handling the problem of constitutionalism as one coming within the scope of legality. The constitution, be it viewed from any side, is a statute law; its creator is the legislative organ, its form and method of promulgation conform to those of any other statute law.

Still when the constitution is surveyed from the other side, from the position it occupies in the hierarchy of legal rules, we have to draw a line between legality (the observance of the rule of law) and constitutionalism. As has already been pointed out, the constitution is a legal norm of highest order and greatest force in a given state. This is reflected by the fact that constitutionalism has a higher order of value, and is a notion carrying a larger number of political elements than general legality. For the safeguard of constitutionalism means other than those of the usual forms of a supervision of legality have to be applied. For a socialist constitution its permanency has to be remembered, i.e. its trait that it cannot be amended by a simple legislative Act, and what is of greater significance in the Hungarian constitutional system, the Presidential Council of the People's Republic, even though it has a substitutive competence between the sessions of the National Assembly, has no competence of amending the Constitution.[13]

Hence, while the safeguard of legality is extended beyond the observance of the laws to that of decree-laws, government regulations, and even legal norms of a lower order, the notion of constitutionalism adheres in the socialist State to a single legal rule, viz. the constitutional charter itself. We have to analyze the special position of this legal rule, whenever the problem of constitutionalism emerges. And even when we emphasize that everywhere, even where there is an occasion and a way to have recourse to the methods used for the safeguard of legality, we have to remember that the special position of

[13] Clause (4) Sec. 20 of the Constitution. This thesis is repeated in the constitutions of all socialist states.

the constitution calls for special safeguards of constitutionalism. We have to study therefore this problem with reference to the forms of the safeguard of legality.

Similarly as the safeguard of legality (observance of the rule of law) that of constitutionalism also has its projections in society. Among these the one of greatest importance is the supervisory, guiding activity of the communist party. The central and other organs of the party influence the governmental agencies in a sense that these observe the postulate of legality and constitutionalism with yet stronger consistency. Naturally this is a crucial problem; on the governmental and legal lines efforts have to be made to render the aid extended by the party yet more effective with institutional guarantees. Therefore the next step is an approach of the fundamental problems of these institutional guarantees.

The principle of popular sovereignty prevails in the socialist political organization—so also in Hungary—unbroken. Essentially this means that the fulness of political will, which at the same time is the will of the working people as a whole, is brought to expression by the supreme representative organ of state power, i.e., the National Assembly, which exercises the rights and discharges the duties implied in this will. The Acts of will or normative Acts of the National Assembly, as has already been made clear, are created in the form of statute laws, i.e. in the form of fundamental laws, as well as simple laws (certain Acts of will appear in the form of Resolutions). It follows from the principle of popular sovereignty that the National Assembly is as for authority superior to any other existing or potential organ, it has a kind of established primacy which does not tolerate even a state of balance between the supreme legislative organ and other agencies. (As regards the statute laws this principle and the practice associated with it are prevailing. A certain complexity is introduced by that the Presidential Council of the Hungarian People's Republic formed of members of the National Assembly and substituting it, may promulgate law-decrees. Still, in this case it is clear that the right of promulgating the decrees of statutory force is exercised by the constitutionally substitutive, partial institution of the National Assembly. A further problem with the laws arises because the subject-matters coming exclusively within the scope of legislation have not been defined in a clear-cut manner, which, admittedly, is a problem

of a policy-making nature, but its realization would primarily be a matter of technicality.)

As regards the Constitution here principles and legislative regulation stand firmer. As pointed out above, here the Presidential Council e.g. of the Hungarian People's Republic has no substitutive competence. There is, further, no need for defining the problems encompassed by the Constitution, as in fact the Constitution actually in force in Hungary includes the problems tied up with the problem of substitutive competence, or the subject-matter of regulation, as is the case with legislation.

The enactment of the Hungarian Constitution, its amendment, and any revision of it, can come within the competence of no organ other than the National Assembly. This has been beyond dispute even so far. Jurisprudence considered it the exclusive competence of the National Assembly to decide on the subject-matters to be taken up into the Constitution. Furthermore it may be stated that neither the wording of the Constitution offers an opportunity for the settlement of constitutional questions by way of a plebiscite, as defined in para (d) clause (1) Sec. 20 of the Constitution.[14] The population or the electorate may at any time express its disagreement in the meetings of the electorate, moreover it may even recall a representative taking a position conflicting with the will of his electorate. Still the population, in conformity with the actual constitutional regulation, has no direct share in constitutive activities. Hence the creation of the bases of constitutionalism is a function of the National Assembly.

However, besides the constitutional charter, the National Assembly calls to life also other statute laws. Whether or not these statute laws may from the very outset be considered constitutional, is a problem which has been analyzed by the theorists of State from a number of aspects. The crux of the problem is whether in a given State the legislature is considered one of the central organs, one of several, as

[14] For our part we believe that this form of a plebiscite is a kind of consultative plebiscite which merely informs the National Assembly and the superior political organs of the position taken by the population in a definite question, but is void of a legislative force substituting that of the political, representative organ. For definite cases the Yugoslav Federal Constitution in Section 214 decrees the obligatory referendum for an amendment of the Constitution (here the case is one of the disagreement of the particular chambers).

in the bourgeois States, where the Montesquieuian principle of the division of powers (or the 'modern' theory of a rationalization of powers and with it the eclipsing of the legislative-representative organ) dominate, or the supreme organ of State power, like in the socialist countries. In a bourgeois state there is no obstacle whatever to entrusting an extraparliamentary agency with the supervision of the parliament whether its legislative activities are in conformity with the constitution. In this case the latter exercises supervisory rights over the parliament—the maker of the constitution—in the 'defence' of constitutionalism. Such powers have in general been conferred on the judiciary (in the United States of America on the Federal Supreme Court, in other bourgeois States, so in the German Federal Republic, on the Court of Constitution specially created for the purpose).[15] There is no doubt that this construction raises the organs of the judiciary to a position above the parliament. A political organization on this pattern would be inconceivable in a socialist State. Beér correctly stated that in a socialist State a court of constitution would be unimaginable, as this would be conflicting with the primacy of the supreme organs of state power, the absoluteness of their competence.[16]

[15] See on this subject Carl J. Friedrich, *Der Verfassungsstaat der Neuzeit*, Berlin–Göttingen–Heidelberg 1953, p. 215; he suggests that the initiators of the American supervisory system by the judiciary, viz. Hamilton and Marshall, also had in mind that the Supreme Court shift the construction of the Constitution towards conservatism.

[16] Cf. Beér, Kovács and Szamel, *Op. cit.*, p. 280; and L. Szamel, *A jogforrások* (The sources of law), Budapest 1958, p. 162.—At the same time it has to be stated that recently in the constitutional regulation of certain socialist States constitutional judicature has been introduced. In Yugoslavia both the Federal Constitution and those of the federal republics introduced constitutional courts, partly to reinforce the hierarchical character of the Federation, partly to segregate the safeguards of the Constitution within the governmental organization (cf. Sections 145–51 of the Federal Constitution). The priority of a certain degree of the supreme representative organ is guaranteed by the provision that after the decision of the Constitutional Court it is the right and duty of the Federal *Skupshtina* to reconcile the statute law with the Constitution within six months following upon the decision. The decision of the Constitutional Court of Yugoslavia will be directly effective on the expiry of this term. The Czechoslovak Act on Federation, effective since January 1, 1969, also called to life a Constitutional Court, in the first place to safeguard the constitutionality of the Federation. Two positions most interesting on Yugoslav

After these premises the statement may be advanced that in a socialist State the supreme representative organ of state power (in Hungary the National Assembly) cannot pass unconstitutional legislation. The guarantees are the means enumerated above and deposited in the hands of the working people, the electorate. By having recourse to these, the people may exercise an appreciable influence on the representatives, and so on the legislature, and all this is buttressed up by the policy of the Party. Therefore there is no reason for, and theoretically not even a possibility of, creating an extra-parliamentary organ for the defence of the constitution, this particularly momentous Act of the supreme representative organ of state power, or investing an already operating agency with a new competence. In addition to this reasoning, let it be emphasized once again that the socialist political organization cannot even tolerate an organ which, for any reason, operates on a level higher than the legislation, with a competence in excess of that of the legislature.

A supervision of the legislative activities of the legislature, when viewed from the constitutional aspect, has to be entrusted to the legislature itself, i.e. to the electorate. This is dictacted by the consistent application of the principle of popular sovereignty and the supremacy of the National Assembly, the supreme representative organ of state power. However, there is still a wide scope where the study of the observance of constitutionalism has to be continued, now as far as the Hungarian people's democratic State is concerned.

J. Beér[17] is right in stating that the provisions of the Constitution are commands addressed in the first place to the legislators, i.e. among others, to the Presidential Council of the People's Republic and to the Government. While within the limitations of the Constitution the National Assembly is the organ expressing national sovereignty, all other governmental organs are expressing popular sovereignty

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constitutional procedure may be found in Jovan Djordjević, 'Les Cours Constitutionnelles en Yugoslavie', *Le Nouveau Droit Yuogoslave* 1963, X–XII, pp. 9–24; and in Vladimir Krivic, 'Les jurisdictions constitutionnelles', *Recueil des lois de la RFS de Yougoslavie*, Vol. *XIV*, Beograd 1965, pp. 3–15.

[17] János Beér, Népköztársasági alkotmányunk normativ jellegéhez (On the normative character of the Constitution of the People's Republic), *Az Állam- és Jogtudományi Intézet Értesítője 1960*, Nos 2–3, p. 123.

merely indirectly, and are in all instances subordinate to the constitution-making organ on the summit of the hierarchical order of the State, i.e. the National Assembly. The question whether these organs may, or have to be, supervised on the grounds of constitutionalism, must be answered in the affirmative.

The next question is whether political supervision can be instituted as supervision of legality (observance of the rule of law). However, to this end the present position of the supervision of legality has to be put under a closer scrutiny. One of the foremost organizational forms of the safeguard of legality, and for the purpose of this study the one to be taken into consideration in the first place, is the supervision by the procuracy. The limits of the scope of operations and activities of the procuracy have been drawn by the legal rules applying to the procurators' offices. On this understanding[18] the organ of the highest level that may come within the scope of supervision by the procuracy on the grounds of legality is the minister. Necessarily, the supervision of the Presidential Council and the Government has been omitted. (The presence of the Supreme Attorney of State at the sessions of these organs does not constitute a right of interference on his part.) The extension of the competence of the procuracy, namely of the Supreme State Attorney upwards could in no event be justified. If this were done the Supreme State Attorney would exercise supervisory rights over the activities of the Presidential Council of the People's Republic, which is exactly the authority in which the right is vested to recall the Supreme Attorney of State, and to elect a new one, between two sessions of the National Assembly. Nor would such a situation be welcome in the relation between Government and Supreme Attorney of State as both organs are equally subordinate to the National Assembly, i.e. they are at an equally high level in the political hierarchy. This finding prompts the statement that a supervision of constitutionalism in its relations to the Presidential Council of the Republic and the Government cannot be assigned to the procuracy, the organ discharging supervisory functions on the ground of legality. Consequently another organ has to be found for the purpose.

[18] Clause (3), Sec. 4 of Hungarian Law-decree No. 9 of 1959.

In point of principle the idea suggests itself to entrust the plenum of the National Assembly itself with the functions of safeguarding the Constitutions as the most appropriate organ on this level. Incidentally the National Assembly actually hears the Government's report of its activities (clause (1) Sec. 27 of the Constitution) and exercises supervisory rights over the Presidential Council of the People's Republic in matters of the promulgation of decree-laws (clause (5) Sec. 20 of the Constitution). It cannot be doubted therefore that beyond a supervision and guidance of the general policy of these organs this system of requesting reports serves the supervision of the observance of legality, and so of constitutionalism.—Still for organizational reasons this method appears to be unfeasible. There is no doubt that even in the future the National Assembly will not meet frequently enough to undertake this task. However, the supervision of the activities of the Presidential Council and the Government on the ground of constitutionalism comes in all events within the competence of the legislature, in fact there is no other superior organ above the two in the People's Republic. *De lege ferenda* the associated functions ought to be kept apart, namely the surveillance of the legislative activities of the Presidential Council and the Government on the ground of constitutionalism should be entrusted to one of the committees of the National Assembly, preferably to the Committee of Law and Justice, which would be the most straightforward solution, whereas the annulment or amendment of the legal rules promulgated by these organs would come within the exclusive competence of the National Assembly or its substitute, the Presidential Council of the Hungarian People's Republic. The parliamentary committee should in this case be convened at more frequent intervals, and this committee would then permanently supervise the legislative Acts, and in the event of an infringement of the Constitution, forward a report to the National Assembly itself.[19]

[19] As a matter of curiosity it should be noted that in Year III of the French Revolution Abbé Sieyès in this matter took a stand against the role of the judiciary, and suggested the organization of a constitutional jury of members of the popular representation. This would have been a jury to decide in matters of a breach of the Constitution (speech of the 2nd of Thermidor). Cf. Esmein-Nézard, *Eléments de droit constitutionnel français et comparé*, Paris 1927, Vol. I, p. 638.—Even if not this path had been chosen by the makers of the Rumanian

To some extent this construction would amount to undue foresight; still it would redound to the further increase in the authority of the Constitution.

Much simpler is the solution of the safeguarding of constitutionalism on the level of organs of a lower order (ministries, other central specialized agencies, the local organs of state power and public administration). In addition to the superior authorities, the organs of the procurator's office take charge of the supervision of these organs on the ground of legality. The supervision of legality by the procurator's office, completed with the judicial proceedings guaranteed by Sec. 55 of Act IV of 1957, provide a wholly reassuring solution for the safeguard of the observance of the rule of law in Hungary. On this level the problem of constitutionalism mostly raises the issue of the observance of the rule of law. In this case the Constitution will appear as a statute law, the constitutional or fundamental law. Nor can it be doubted that should, e.g., the procurator's office be confronted by two competing legal rules, i.e. the Constitution and any other legal provision, by his erudition in law and his sense for the law the procurator will stress the priority of the Constitution. For this reason, in our opinion, the safeguard of the Constitution on the level of organs of lower order may be entrusted to the procuracy and its agencies even in the future, while maintaining the responsibility of the superior authorities.

It is also a function of the members of the procurator's offices to accept the provisions of the Constitution as such as directly binding the governmental organs and the citizens, and not merely as political or legal declarations. Naturally, and exactly following from the character of the Constitution, the problems of constitutionalism may emerge not only within the sphere of general supervision, but also in all branches of supervision, by the procurators.

In this manner the observance of the rule of law and constitutionalism, the supervision of the observance of the rule of law and constitutionalism, will come into contact in a vast area. During the

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Constitution of 1965, still Section 53 made it the function of the constitutional committee of the Great National Assembly to supervise legislation for its constitutionality. However, decision in this matter can be taken exclusively by the plenary session of the Assembly.

past years the political organs have accumulated many useful experiences in the sphere of a supervision of the observance of the rule of law. These experiences may be turned to good account also in the supervision of constitutionalism, by no means less important.

3. SOCIALIST CONSTITUTION IS NOT FICTIVE. THE EXCLUSIVENESS AND THE STABILITY OF THE CONSTITUTION IN SOCIALIST STATES

The significance of the constitution of a socialist State is marked by three traits which establish a characteristic relationship between constitution and the other Acts of the legislature. These are (i) the absence of fictitiousness, (ii) the exclusiveness of the fundamental law, and (iii) the stability of the constitution.—Although at first glance these traits draw from different sources, still their common origin and common objective are easily recognizable.

(i) As has already been pointed out by a number of scholars, the general fictitiousness of a capitalist constitution has social and economic origins. Capitalist society, particularly in its liberal phase, cannot waive illusions to be nurtured in the broad strata of society. The constitution, to the stability of which so many illusions attach, is not only in its initial phase, but also in the period of its decomposition, a means of propaganda on the part of the *petite bourgeoisie* and the strata of workers influenced by it. This character of a bourgeois constitution stands out with particular clarity in the enumeration of civic (human) rights, still to a by no means lesser degree in the demarcation of the competences of the particular representative organs. However, the constitution is merely a skeleton legal rule, whose general statements have to be translated into reality by other legal rules, or enacting clauses. In the bourgeois States there is a difference of contents between the constitution and other legal rules enforcing it. The capitalist class cannot, and does not want to actually enforce the norms of the constitution as this would be conflicting with its economic and political interests. There remains therefore the fictive constitution and the 'enacting or enforcing clauses' expressing the true interests of the bourgeoisie mostly with clarity. Historical expe-

rience demonstrates that the divergence is most striking between the constitutions and the regulations and instructions of public administration. One may venture the statement that the constitutionalism of public administration was in fact dead already in the middle of the 19th century.[20] The want of consciousness on the part of the bourgeois legislator necessarily widens the gulf between the constitution and legal regulation going into detail. Lenin's remark on the fictitious constitution ("the law and reality disagree")[21] compares social reality, and so the provisions laid down in the enacting clauses, to the paper constitutions of the bourgeoisie. Similarly, historical experiences confirm that institutions like constitutional or administrative courts, etc. do not modify this general trend. In fact viewed from the other side the fact remains that the bourgeoisie on recognizing certain factors in social evolution will, by bearing in mind these factors, even more accentuate the fictitious character of the constitution just in the defence of class interests.

In a socialist society the conditions of the fictitiousness of the constitution are absent just as they are permanently present in a capitalist State. Scientific ideology, Marxism–Leninism, provide the means for a recognition of the true trends in the evolution of State and Society, and for the enforcement of these trends in the supreme legal rule governing political activities, the constitution. The constitution has ceased to be a collection of the illusions of Utopists, neither is it the store-room of dishonoured promises of clever bourgeois, but the true fundamental statute of the working people, which on a scientific basis records the results so far achieved, sets the realistic targets of State and Society, defines the most appropriate forms of the organization created to this and also its methods of operation. Principles and practice of Marxism–Leninism have been drawn up by the most

[20] Imre Szabó exposes essentially the same idea when contrasting the bourgeois legal rules as a form obscuring the essence to the various kinds of their interpretation, asserting thus the real, i.e. class content of the latter. Cf. *A jogszabályok értelmezése* (Interpretation of the legal rules), Budapest 1960, p. 13. – The same relation appears between the 'fundamental statute law' and other legal regulations the latter – originating mainly from public administration – expressing the real will more faithfully.

[21] V. J. Lenin, *Полное Собрание Сочинении* (Collected Works). Том 17, Государственное Издательство Политической Литературы, Москва 1961, стр. 345.

conscious team of the working class, the communist party, and it is the party that, with the aid of the mechanism of the dictatorship of the working class, integrates these principles and practices in the most important political regulation, the constitution.

However, in order to prevent the constitution from becoming fictitious, in addition to the conditions outlined above, the will is needed to carry through the provisions of the constitution in the implementing statutes. This trend of thought will lead to the idea of constitutionalism. The socialist state wants constitutionalism, and for this reason it subordinates with most rigorous consistency the lower organs of state power and public administration, and also the judiciary, to the supreme representative organ of state power, solely authorized to draw up a constitution. However, this is at the same time a political exigency, because it is by this way that the targets—laid down also in the constitution—can be achieved in the course of building socialism, and then communism; targets which the discipline of Marxism–Leninism has defined as such are possible or even imperative. Since a socialist constitution is a tool for achieving the objectives set by the communist party and the working people, it is the duty of the socialist political organs to take charge of the enforcement of the constitution (this is what the party, the population, all mass organizations demand from them). It follows therefore that the constitution can become fictitious, even in parts, only when in the given socialist State grave political errors are committed. Political errors, however, are reparable, and so an end may be put to the fictitiousness of certain provisions of the constitution, a fictitiousness which as experience shows is of short duration only. The existence of a fictitious constitution is inevitable in a bourgeois State, whereas the want of same, the observance of constitutionalism, are a necessity in a socialist State. It is for this reason that in a socialist State the hierarchical position of the constitution, the subordination of the statute laws and other legal rules or Acts to it i.e. the priority of the constitution, is of enormous significance.

(ii) By the exclusiveness of the constitution it is understood that 'historical' (unwritten) constitutions are out of question in a socialist State. In the course of evolution the rules bringing under regulation the fundamental social and economic organizational problems of the given State, the rights and duties of the citizens, are of necessity

compiled in a single statute law. That there is no 'historical' constitution in a socialist State, follows from the fact that all historicity would as a matter of course refer back to the capitalist, and even feudal legal order. The organs of the socialist State in their legal rules closely follow the economic and political evolution, and therefore the constitutions as fundamental statute laws will have to respond to similar conditions. (Even in a country where the socialist revolution took place a half century before, i.e. in the Soviet Union, each momentous economic and social change entailed the introduction of an entirely new constitution.)—As for the doctrine that in a socialist State constitutional rules should be laid down in a single statute law, it has not generally been accepted. Before offering reasons for this doctrine it has to be made clear that actually this is the situation in the Soviet Union, in all her union and autonomous republics, and in the people's democracies in Europe and Asia. (This is the situation in Poland since the introduction of the Constitution of 1952.)[22] From the wording of most of the constitutions (Article 146 of the Soviet Constitution, Article 151 of the Constitution of the Russian Federation, Article 127 of the Ukranian Constitution, Article 91 of the Polish Constitution, Article 108 of the Constitution of the German Democratic Republic, etc.) it is clear that a constitution can be amended solely by modifying, expanding or narrowing down the text of the only effective constitution, and not by drawing up a new constitution charter. Or, a new constitution must be introduced and it supersedes the earlier constitution. This practice of constitution-making owes its currency not to mere chance. When we now keep an eye on the dwindling significance of the constitutions in the capitalist States, we shall have to face a process which may be termed as that of the devaluation of constitutions. Important regulations are superseded by minute procedural rules, so that constitutional regulation will of necessity lose much of its authority and weight.

[22] Previously the Constitution of the Republic of Poland was composed of the following legal provisions: the declaration of the Seym in the matter of civic rights and freedoms (February 22, 1947), the constitutional law of February 19, 1947, the constitutional law of February 4, 1947 of the election of the president of the Republic, and the proclamation of the Polish Committee of National Liberation.

In the socialist system the constitutions sum up and bring under regulation the problems of greatest importance and weight, i.e. fundamental problems. In socialist jurisprudence it is a generally accepted opinion that constitutions must not be too detailed. The existence of a constitution consisting of several statute laws cannot be justified unless detailed regulations are also included. The single constitutional charter would on account of its size make such a regulation of details impossible. In such a constitution regulation of organizational details will necessarily be narrowed down.

The single constitutional charter, the exclusiveness of the fundamental statute law, redounds to a better observance of constitutionalism. The existence of several fundamental Acts will in all cases raise the problem of priority and of the constitutional hierarchy, problems hard to solve, and therefore apt to introduce uncertainty. The single constitution, so general in the socialist States, is the basis of the consolidation of constitutionalism. Obviously all other statute laws are subject to the constitutional provisions, and so also the supreme legislative representative organ of state power is subject to the constitution which it has enacted, until this constitution has been amended in the appropriate manner. Among others socialist legality (the observance of the rule of law) also means that in the hierarchy of the legal rules the statute laws of an order below that of the constitution are in all cases of equal weight (by taking into consideration the principle of *lex posterior derogat priori*). So the otherwise extremely important codes (such as the Criminal Code, the Civil Code, the Code of Civil Procedure, the Code of Public Administration, the Council Act, the Labour Code) are not some sort of a midway house between the constitution and the laws. While lawfulness demands that a maximum stability should be guaranteed to the codes, yet this is not endorsed in any socialist constitution by way of a qualified majority, or other organizational guarantee. For neither formal reasons, nor on considerations of content can a statute law be raised to the level of the constitution, with the exception of the single constitution, or fundamental statute law. (This thesis is not contradicted by clause (3) Sec. 51 of the Constitution of the Czechoslovak Socialist Republic, which stipulates a qualified majority, like the one required for the constitution, for the declaration of war, changes of the state frontiers and the election of the president of the Republic. The

subject matters here enumerated do not come within the scope of some sort of a separate constitution-making.)[23]

(iii) The third characteristic trait in a socialist constitution is its stability. Still this stability is not absolute, and does not even pretend to be. So the constitutional laws of the socialist States do not recognize the institution of the *pouvoir constituant*, in fact on the highest level the representative organ receives its sovereign rights from the people as a whole, and so an organ of a yet higher level is out of the question in these countries. No socialist constitution declares the unchangeable character of any of its provisions. The stability of the constitution consists in that the amendment of the constitution is tied to a special procedure of the regular legislative organ (the supreme representative organ of state power), and its approval requires a qualified majority. This provision has two objectives, viz. (a) it guarantees the maximum degree of stability to the fundamental statute law, without at the same time putting up barriers to modifications which may become necessary; and (b) it takes out the constitution from among the other statute laws, by conferring a formal distinction on it. In the Hungarian People's Republic, in like way as in the majority of the socialist countries, the constitution underlines its stability by withholding the power of amendment, expressly or for want of a general substitutive competence, from the Presidium (in Hungary the Presidential Council), otherwise substituting the supreme organ of state power. From this thesis it follows, in particular in Hungary, that non-statutory provisions (legal rules defined by decree-laws) cannot be taken up in the Constitutional Act, and so its position and weight in the hierarchy of the sources of law have been fixed. In the majority of the socialist countries these traits cannot be applied to other normative legislative Acts. It is by this way that the constitutional charters rise to a higher category of legal rules, which, however, does not constitute an obstacle to their being modified or amended. The provisions governing the amendment

[23] This, however, may happen and has happened in the course of socialist constitution-making, on particular occasions even in the present days; when the constitution could not be amended wholesale, when it was not possible to create new constitutional laws (e.g., in Czechoslovakia, when the country was turned into a Federation, and the organs of this Federation had to be called to life).

or modification of the constitution merely serve for forestalling too frequent amendments, which eventually might be apt to detract from the authority of the constitution.[24]

4. THE LAWS. THE GENERAL, EXCLUSIVE AND EXPRESS COMPETENCE OF THE LEGISLATURE

The most frequent normative Act of the organ occupying the summit of the representative system of state power is the law. As has already been made clear the constitution is also a law, still invested with specific characteristics which exactly for its position raises it above all other laws. The statute laws of a non-constitutional character (so also the codes mentioned earlier) are of equal weight and occupy the same rank in the hierarchy of the sources of law. In the socialist countries the supreme organ of state power promulgates the legal norms binding the citizens in general in the form of law (which does not mean that a law can have a normative content only). This confirms that apart the constitution, the law is the most significant legal Act of the socialist State. L. Szamel quotes two principal reasons for this, viz. (a) the fact that the creative organ receives its authority, and direct mandate from the people; and (b) the criterion of content which says that the laws bring under regulation most typical relations of a most permanent nature.[25] This by itself correct statement presents two associated and mutually reflective traits. As a matter of fact a reasonable division of labour, and the position of the supreme representative organ of state power in the political organization prompt that the supreme organ should not bring about legal Acts of whatever character, but only such that with their permanent character and significant content, decisively influence the operations of the political order and the governmental agencies, i.e. control political and social activities in their most characteristic and important

[24] How clearly this postulate stands out in the socialist countries is perhaps best exemplified by Act II of 1957 in Hungary on the amendment of the Constitution. This declared Sec. 24 concerning the enumeration of government departments—often requiring the amendment of the Constitution in Hungary (and for that matter not always in the appropriate form)—a simple legislative Act.

[25] Beér, Kovács and Szamel, *Op. cit.*, p. 87, and L. Szamel, *Op. cit.*, pp. 42–3.

spheres. On the other hand it is unimaginable in a socialist State that legal rules of this type should originate from organs other than the representative, or to be more precise, the supreme organs of state power. However, it stands to reason that this statement has no absolute value. In fact, in particular in the Hungarian constitutional structure, the significance of the equal rights of the presidium, i.e. the Presidential Council of the People's Republic cannot be argued in the exercise of substitutive powers in the sphere of the creation of legal rules. On the other hand it may be argued, what questions have to be considered as having a most permanent and most typical character. Still all this will not modify the earlier statement that the said principal traits in fact define the position of the legislature, legislator and law in a socialist State. For a closer approach of the problem, further investigations will have to be made.

Earlier, in Chapter Two, we have already mentioned that during nearly twenty years in the evolution of the Soviet Union legislation was not concentrated at the congresses of the soviets of the Soviet Union, or those of the union republics. Moreover, in the first writings on constitutional law the existence and necessity of legislation as an independent political function was denied.[26] It was Article 32 of the Constitution of 1936 which deposited legislation exclusively with the Supreme Soviet of the Soviet Union. It is known that when the draft-constitution was put up for debate there were opinions in favour of the maintenance of the earlier system, at least partially. Stalin, by emphasizing the need for a stability of legislation, dismissed this suggestion.[27] Since then this form of legislative exclusiveness has been taken up in all socialist constitution. On analyzing this principle it will have to be established, what sort of a right this principle settles for the supreme representative organs of state power.

Article 32 of the Soviet Constitution, quoted above, by itself confers no competence on the Supreme Soviet. Article 31 quoted earlier refers to the competence of the Supreme Soviet and by omit-

[26] Of this period also some sort of a 'free law' approach was characteristic. The attempt was made to prove that owing to the revolution such legal phenomena had emerged that could not be fitted into the framework of positive law.

[27] J. Stalin, *The Problems of Leninism*, Foreign Languages Publishing House, Moscow 1945, p. 540.

ting a seriatim enumeration declares that the rights listed in Article 14 of the Constitution come within the competence of the Supreme Soviet provided that the Constitution does not expressly assign any of these rights to the competence of other organs (Presidium, Council of Ministers, or ministries).—In conformity with clause (3) Sec. 10 and clause (1) Sec. 14 of the Constitution of the Hungarian People's Republic, legislation expressly comes within the competence of the National Assembly. Here the competence has been defined in a manner different from that adopted in the Soviet Constitutions, where owing to the federal structure of the country hardly another solution could have been found. Clauses (2) and (3) Sec. 10, clause (5) Sec. 12, clause (3) Sec. 18, clause (2) Sec. 23, clauses from (1) to (3) Sections 27 and 35, clause (2) Sections 36 and 37, clauses (3) and (5) Sec. 39, clause (1) Sections 43 and 66 of the Hungarian Constitution delimit the sphere of competence of the National Assembly still only clauses (2) and (3) Sec. 10 make mention of norms. These enumerations cannot be exhaustive for the simple reason because according to clause (2) Sec. 10 "the National Assembly exercises all rights resulting from popular sovereignty". In this case legislative exclusiveness cannot mean more for the National Assembly than a formal guarantee that the legal Acts of any other organ (except in Hungary the Presidential Council of the People's Republic) are below the level of laws and therefore cannot be derogatory to the legal rules of the National Assembly passed in the form of a law. And this is by no means little, because even by itself it stabilizes the hierarchy of the legal rules and the legislative functions of the representative organs of state power. In no event does this formal guarantee inform of the extent of the legislative competence of the supreme representative organs of state power. This means that the principle of legislative exclusiveness cannot be exploited for defining the subject-matters of legislation. It would amount to a complete misconception of historical evolution to state that the principle of legislative exclusiveness had been taken up with such an intention in the Soviet Constitution of 1936. Other paths will have to be sought for when analyzing the subject-matters of legislation.

As regards Hungarian practice a triple level of competence may be discerned here. All three affect the relations of the norms. The various levels are as follows: (a) the general competence of the National

Assembly; (b) the exclusive competence of the National Assembly; and (c) the express competence of the National Assembly.

(a) The general, complete competence of the National Assembly is defined in the first part of clause (2) Sec. 10 of the Constitution. Accordingly the supreme organ of state power exercises all rights resulting from popular sovereignty. This provision pronounces that the rights of the National Assembly, among them the right of creating legal norms and the right of legislation are not, and cannot be, limited. Beside the division of labour referred to in Chapter Two, the National Assembly has the power to draw within its sphere of competence any matter, and to extend the sphere it may have divided by way of delegating certain powers.

(b) In the Constitution (except clause (1) Sec. 14 on legislative exclusiveness) there is only a single reference to the exclusive competence of the National Assembly, viz. in clause (4) Sec. 19 concerning the amendment or modification of the Constitution. The wording of the Constitution expressly prohibits the Presidential Council from carrying out changes in the Constitution (or from drawing up a new constitution by way of amendment). However, there are rights coming within the competence of the National Assembly, in regard of which there are no prohibitive provisions that have been taken up in the Constitution still it follows from the sphere of authority of these rights that they must come within the exclusive competence of the National Assembly. The reason is that: (i) these are cases of the own internal organization and the own agencies of the National Assembly (election of officers, committees, drawing up of standing orders, decision on the validity of polling, dissolution of the National Assembly before the expiry of its mandate, or declaration of an extension of the term of the mandate, establishment of the incompatibility of members of the National Assembly): (ii) the case of the exclusion of the Acts of the Presidential Council proceeding in a substitutive capacity (election or recall of the Presidential Council itself). It is of interest to note that under the Hungarian Constitution an exclusive competence can be established also on two levels only. Among the competences here enumerated there are few only which may be termed normative and, in particular, legislative Acts. There is a large number of special Acts, or matters, which call for a decision of the National Assembly.

(c) By the group comprising what are called express competences the rights are understood which the Constitution itself declares although by this fact it does not assign them to its exclusive competence. The sections of the Constitution which establish competences for the National Assembly have been analyzed above. A study of these passages will show that they contain legislative or normative Acts in a moderate number only. A law must define the organs of government (clause (2) Sec. 10), the State budget (paragraph (b) clause (3),) the national economic plan (paragraph (c)). Laws must create new ministries, and dissolve others, define or modify the competence of the ministries (paragraph (f)), laws must proclaim a general pardon (paragraph (h)), decide on the method of calling the members of the government to account (clause (2) Sec. 27), on the regulations applying to the councils and the executive committees (Sec. 35), on the organization of special tribunals (clause (2) Sec. 36), on the extraordinary definition of the organization of the judiciary (Sec. 37), on the election of the judges of the county and district courts (clause (5) Sec. 39), regulation of the election and recall of the members of the National Assembly (Sec. 66). Accordingly, under the Hungarian Constitution the exclusive and express legislative competences do not coincide.

Since, however, the enumeration of the exclusive legislative competences is rather scanty, and already in this phase the extension of the competence of the National Assembly appears to be advisable, before all the question must be answered whether there is a way to define the legislative competence of the National Assembly exhaustively, in either the Constitution or another statute law. The answer is an immediate 'no'. As a matter of fact clause (2) Sec. 10 of the Constitution quoted above, following from the character of the representative organs of a socialist state power, defines the competence of the National Assembly as being unrestricted and unrestrictable, including its legislative competence.

Any itemized enumeration would come into conflict with this principle of the socialist discipline of constitutional law, and at the same time narrow down the sovereign competence of the supreme representative organ of state power. And this would violate one of the cardinal socialist principles of statehood, i.e. socialist democratism and so also the principle of popular sovereignty.

Another question to be answered is whether there is need for an enumeration of the subject-matters of legislation at all. There are authors who openly or covertly profess the undefinable nature of the subjects of legislation. There is an agreement in the discipline of constitutional law in the socialist countries insofar that no comprehensive definition, of universal and at all times equal validity can be given of the content of the statute laws as legal norms of highest order, and of the subject matters these statute laws may comprise. Moreover, from the foregoing it is obvious that a full elaboration of the competences is out of the question. On the other hand it is possible, and even necessary, to define the exclusive competence of the legislation, for in general and in particular under the terms of the Hungarian Constitution the sphere of activities of the supreme representative organ of state power has been unduly narrowed down, so that on this level socialist democratism does not prevail sufficiently. Hence the problem is not so much of the failure to define a statute law in an abstract form, something which in our opinion will never come to pass,[28] but one of the establisment of the essential legislative minimum in a concrete and exhaustive form. As a matter of fact the definition of the exclusive competence is a minimum, as the National Assembly may draw within its competence the performance of any task, moreover competences, at any time. However, the definition of the exclusive competence is a function of the Constitution, for the very reason because there is no need for including in this category transitory functions which neither for their weight nor for their nature call for the decision of the supreme political organ. This would not even be possible. Partly, there is several years' experience available which points in the direction in which we have to progress. Partly we have to remember that the democratisms of both the Soviet State and the people's democracies have become stronger through the operations of external and internal circumstances, and from this point the Resolutions passed by the 20th and 22nd Congresses of the Communist Party of the Soviet Union are milestones in world history. We cannot therefore stop at the legislative practice of earlier years, but have to proceed by taking into account the exigencies of

[28] To this refers L. Szamel in Beér, Kovács and Szamel, *Magyar államjog* (Hungarian constitutional law), Budapest 1960, p. 88; and in L. Szamel, *A jogforrások* (The sources of law), Budapest 1958, p. 17.

a reasonable division of labour and of state organization.[29] Consequently a settlement cannot rely exclusively on the definition of the questions which earlier were taken up in the legislative Acts of the socialist States. An analysis has to cover how a division of labour conforming to the basic principles of socialist state construction can be achieved between the supreme organ of state power and the central agencies of public administration on the one, and the former and the local representative agencies of state power on the other part. The two ostensibly conflicting forces, i.e. socialist democratism and the need for central guidance, can and should be reconciled.

Several authors have already analyzed the nature of exlusive competence, with a view to future legislation. L. Szamel in his work quoted earlier sets out from the present position of Hungarian legislation, still even he believes that further subject-matters should be drawn within the sphere of exclusive competence (the codification of labour law, further, the earlier provisions associated with civic rights and duties as defined by the Constitution, fundamentals of the regulations governing the co-operatives, taxes, excises, customs, the organization and operation of the procuracy.[30] Although we can but approve the conclusions which he has eventually drawn, still we cannot agree with the starting point from which L. Szamel sets out.

In the Hungarian literature of constitutional law also A. Ádám has dealt with this set of problems.[31] It is our impression that he sets out from the correct premises. In fact, he would define the exclusive

[29] This has to be recognized the more because, e.g. in Hungarian legislation, notwithstanding the remarkable change since 1957, no system of the subject-matters of legislation has developed. The recent years have been a period of codification, when the codes of administrative procedure, nationality, people's control, civil law, mining, and national defence, further the supplementary Act of civil procedure have been put on statute book. There have been legislation introduced on posts and telecommunications, building, water conservancy, the franchise, agricultural productive co-operatives, land property and land use. In addition statutes laws on the amendment of the Constitution, national economic plan statutes on the budget and the execution of the budget have been passed. A statute law has brought under regulation marriages with, and the adoption of, aliens.

[30] L. Szamel, *Op. cit.*, p. 31.

[31] Antal Ádám, *A Magyar Népköztársaság Elnöki Tanácsa* (The Presidential Council of the Hungarian People's Republic), Budapest 1959, pp. 119–20.

competence of legislation in the order of the significance of the subject-matters of legislation, *de lege ferenda*. On this understanding he would (i) include those questions of social relations in this group, whose statutory regulation would create constitutional law relations (territorial divisons of the country, fundamental rules of substantive and procedural law governing the elections of the members of the National Assembly and councils, the rules defining the rights and duties of the members of the National Assembly, the rights and duties of the Presidential Council of the People's Republic, its relations to other organs, rules governing nationality); further, such fundamental rules as the statute laws on the long-range economic plan, or budget, the Act of proclaiming general pardon, the enactment of a peace treaty; and (ii) the exclusive competence of the National Assembly should extend to the global regulation involving a major sector of social relationships by way of codes (the Criminal Code, Code of Criminal Procedure, Civil Code and the Code of Civil Procedure, the Labour Code, the Co-operative Act, the Landed Property Act, the Code of Administrative Procedure, the Family Code, etc.); regulations on the enforcement of the fundamental civic rights and duties, statutory regulation of the organization of the governmental organs referred to in the Constitution, and their competences. (As regards the second part of the enumeration we go beyond what A. Ádám suggests, who would not have these matters drawn within the exclusive competence of the legislation, and merely believes that a statutory regulation of these matters would be desirable. Since however, these matters are closely associated with the exercise of rights resulting from popular sovereignty, in our opinion it would be more consistent to have these matters catalogued here wholesale.)

In the majority of the socialist countries there is essentially the same trend in the question of the subject-matters of legislation as under the constitutional conditions in Hungary, irrespective of whether or not in these States the presidium of the supreme representative organ of state power has an express general substitutive competence. As a matter of fact, exactly owing to the failure to declare an exclusive competence, the constitutions widely differ in the definition of the decree-law-promulgating competence of the presidiums, a competence which in the majority of instances might as well include a provisional transfer of the express legislative competence.

As has already been mentioned *the Soviet Constitution of 1936* defines the competence and scope of functions of the Supreme Soviet by an eliminating method. It refers to the enumeration in Article 14, from which it excludes the competences reserved in the Constitution for the organs enumerated there.—In addition, other articles also grant a competence, to be more precise a normative competence to the Supreme Soviet. These are: Article 98 (a law must regulate the legislative authority of the workers' soviets), Article 111 (apart from cases expressly stated by law the court sessions are public), Article 142 (the procedure of recall is laid down in a law), etc. As regards Article 14, the latter enumerates the express rights of the Supreme Soviet in normative matters in an extremely comprehensive form: regulation of definite fundamental organizational problems of the armed forces in clause (g), the formulation of the national economic plans in clause (j), and the establishment of the budget in clause (k), regulation of the fundamental problems of the use of land in clause (q), regulation of the fundamentals of education and hygiene in clause (r), regulation of the fundamentals of labour law in clause (t), organization of the judiciary, procedural law, the regulation of the fundamentals of criminal and civil law in clause (u), legislation in matters of nationality and the rights of aliens in clause (v), definition of the fundamentals of matrimony and family law in clause (z).—This enumeration exclusively includes the subject-matters requiring legislative Acts. In addition it should be remembered that the Soviet literature of constitutional law emphasizes the absolute power of the Supreme Soviet and its rights reflecting popular sovereignty.[32]

Article 15 of the Constitution of the *People's Republic of Poland* refers to the Seym as the organ exercising popular sovereignty. However, the Constitution fails to enumerate the general competences of the Seym. According to Article 19, the Seym approves the long-range plans and the annual budget. In addition, subject-matters of

[32] Cf. Ya. N. Umanski, *Op. cit.*, p. 257; and I. N. Kuznetsov, A Szovjetunió Legfelsőbb Szovjetje Elnökségének ukáza. Jogi természetének és a törvényhez való viszonyának kérdése (The ukase of the Presidium of the Supreme Soviet of the Soviet Union. Problem of its legal character and relation to the law). In *A szovjet államjog kérdései* (Problems of Soviet constitutional law), Budapest 1962, p. 267.

legislation appear scattered over the Constitution (like in the Hungarian constitution), such as the statutory definition of the competences of the ministers (clause 1, Article 33), the detailed regulation of the organization, competence, and operation of the people's councils and their agencies (Article 45), regulation of the organization, competence and jurisdiction, procedure of the judiciary (Article 46), procedure of the election of judges, the definition of their office terms, method of the appointment of the judges of special tribunals (clauses 2 and 3, Article 50), regulation of the competence, and operation of the procurator general (clause 3, Article 54), regulation of the nomination of candidates for the Seym, polling and recall (Article 88). It should be noted that by virtue of Article 26 of the Constitution the State Council has full powers to promulgate decree-laws between two sessions of the Seym, without limitations. From this formulation, and from the reference to the obligation of a subsequent approval by the Seym of such legislative Acts, a structure similar to the substitutive competence of Hungarian law emerges. So here too, the Constitution fails to bring under regulation the exclusive competence. (However, as generally known, in practice the scope of operation of the legislature has expanded appreciably in the People's Republic of Poland since 1956.)

In the Constitution of the *Bulgarian People's Republic* the term 'depositary of the full state power' occurs in relation to the Popular Assembly (Sec. 15), however, general competence is delimited by the Constitution itself by way of fixing the competences of other agencies and a divison of labour. Section 17 of the Constitution enumerates a large portion of the exclusive rights, of which normative are the approval of the national economic plan (clause 6), the annual budget, the regulation of the imposition and collection of taxes (clause 7), transfer to national ownership and the organization of state monopolies (clause 8). In addition, the legislative competence includes the formation of larger territorial units (Sec. 47), method of election and the definition of the office term of judges and lay assessors (Sec. 58), organization of special tribunals (Sec. 59), regulation of the organization and procedure of the judiciary, the definition of the instances of the judiciary (Sec. 60), regulation of military service (Sec. 91). The Bulgarian Constitution does not recognize the general substitutive authority of the Popular Assembly, and not even its

exclusive competence in respect of other governmental agencies. As compared with other constitutions, here the enumeration of the express competence moves within narrow limits.

Although Section 43 of the *Rumanian Constitution* enumerates the express rights of the Great National Assembly, among these a few normative rules, such as approval and amendment of the Constitution (clause 1), regulation of the electoral procedure (clause 2) approval of the national economic plan, the budget and the closing accounts (clause 3), the organization of the judiciary and the prosecution (clause 5), the rules of organization and operation of the people's councils (clause 6), the establishment of the territorial division of the State (clause 7), the proclamation of general pardon (clause 8), ratification and termination of international agreements entailing the amendment of statutes (clause 9), still, in our opinion this Section cannot be considered an exhaustive enumeration of rights, or a settlement of competences.

Clause (1) Article 40 of the Constitution of the *Czechoslovak Socialist Republic* grants a general competence to the National Assembly: "It shall discuss the vital problems of the home and foreign policy of the State, and take decisions on them." The Constitution does not go beyond this definition in some sort of a coherent enumeration of the competences (clause (1) Article 41 speaks only of the developmental plans of national economy and the State budget). At another place too merely a few competences have been touched, such as the franchise and polling, the definition of the methods of recall (clause (4) Article 86), regulation of the competence, creation, organization and procedure of the local people's tribunals (clause (3) Article 101), procedure of the recall of judges (clause (2) Article 102), acquisition and forfeiture of nationality (Article 108).

Section 164 of the Federal Constitution of *Yugoslavia* enumerates the exclusive competences of the Federal *Skupshtina* in eleven clauses. Six of these also speak of the introduction of normative rules; however, the last clause ("it shall deal also with other matters stated in the present Constitution") suggests that the enumeration is not exhaustive.

In all other constitutions regulation is similar to what has been outlined above, so that the presentation of further comparative matter will be dispensed with. Obviously the constitutions fail to enumerate the legislative rights of the supreme organ of state power even in

an exclusive form, on the other hand there are rather wide differences in the presentation of express rights. The most complete and extensive enumeration is that of the Constitution of 1936 of the Soviet Union, and those of the union republics.

The problem of the non-normative statute laws is somewhat at a distance from this sphere. We cannot speak of a uniform practice in socialist legislation in this respect. However, Hungarian constitutional law recognized this type of law. These statute laws are enacted in general on solemn occasions in commemoration of a historical event or personality. Still, L. Szamel is correct in stating that such statute laws that are void of normative rules might as well be passed in the form of resolutions.[33]

5. LEGALITY (THE OBSERVANCE OF THE RULE OF THE LAW)

Finally we should like to touch, briefly, a special problem of the statute laws enacted by the supreme representative organs of state power, i.e. the problem of legality (the observance of the rule of the law). While the constitution and constitutionalism are in close and exclusive relationship to each other (by constitutionalism briefly the observance of the constitution Act is understood), the situation is altogether different with legality. A generally accepted opinion in the Hungarian discipline of constitutional law states that the requirement of legality has been laid down in clause (2) Sec. 71 of the Constitution, insofar as it declares the observance of the Constitution and the constitutionally passed statutory provisions to be binding on both the political organs and the citizens.[34] In fact the term legality (the observance of the rule of the law) embraces three different notions, viz. (a) the observance of the law (*lex*) in the strict sense of the term; (b) the observance of the national (central) normative Acts in the sense Lenin discusses them in his work *On 'dual' subordination and legality*;[35] and finally (c) the observance of all constitutionally created provisions on the part of the political, social and co-operative

[33] L. Szamel, *Op. cit.*, p. 47.

[34] Cf. Beér, Kovács and Szamel, *Op. cit.*, p. 425 (by J. Beér).

[35] V. I. Lenin, *Selected Works*, Vol. II, Part 2, Foreign Languages Publishing House Moscow 1951, p. 682.

agencies, further the citizens (and aliens and stateless persons residing in the territory of the country).—In the socialist theory of the State and law the notion of legality is understood in this latter sense. It follows therefore that the notion of legality does not attach exclusively to the law (*lex*); but to all lawfully created legal rules of a national or local agency. This statement does not conflict with the principle that "legality has to rely in the first place on the laws, and only in a secondary sense on other legal rules".[36] This doctrine results exactly from the principle of socialist democratism, a doctrine with which the conclusions we have drawn earlier are in agreement. From the premise the statement follows that all fundamental problems of central or national provisions should be embodied in a law. However, this cannot be maintained, and it is unlikely that this will come true in the future. If therefore the intention with the consistent enforcement of the principle of socialist legality is to compel the citizens and the political organs equally to respect the central, i.e. fundamental, legal rules of the country and the local normative Acts, then not only the observance of the effective laws, but also that of the decree-laws, government regulations and decisions, ministerial regulations, the by-laws of the councils, etc. has to be included as in these too, the will of the respective political organ should be recognized. In this case, notwithstanding its designation, the objective basis of legality is not exclusively the law, but any legal Act of any agency of state power, or public administration, manifested in the form of a legal rule. Grammatically the term legality serves to make it clear that the ultimate objective basis of all is the law (*lex*), as in point of fact all political organs trace back their provisions embodied in a legal rule to a law, or even to the Constitution.[37] It must be stressed even in this connexion that legality as well as constitutionalism rely on legal rules. And in a socialist State it attaches to these

[36] L. Szamel, *Az államigazgatás törvényességének jogi biztosítékai* (Legal guarantees of the legality of public administration), Budapest 1957, p. 12.

[37] A similar position has been taken by I. N. Kuznetsov: ". . . the statute laws of the Soviet Union as a rule establish the initial fundamental theses of Soviet law, bring under regulation the most typical and most permanent relations in Soviet society and in this sense the Soviet statute law is the legal basis of the everyday legislative activities of all other Soviet governmental organs." *Op. cit.*, p. 238.

legal provisions and not to some sort of a 'principle'. The will of the socialist State finds expression in these legal rules, and the State insists on their uniform observance when it raises the postulate of legality.

In the socialist countries, as far as the political organs are concerned, the safeguard of legality is entrusted partly to the superior political organs (see clauses (2) and (3) Sec. 19, clause (4) Sec. 25, clause (4) Sec. 31 of the Hungarian Constitution), partly to the organs of the procuracy, and in Hungary in cases enumerated in Sec. 55 of Act IV of 1957, to the judiciary. The procuracy and the judiciary supervise the observance of the rule of law by the citizens. The organs of the procuracy have been called to life expressly for the purpose, and are in this respect subordinate exclusively to the supreme representative organ of state power (except in the People's Republic of Poland, where under Article 55 of the Constitution they are subordinate to a substitutive organ, the State Council).

We must concede that in the majority of the socialist States the constitutions draw the observance of the constitution into the national scope of legality, although (on the ground of what has been set forth in paragraph 2 above), the constitution as a legal rule of highest order calls for particular safeguards. The fact that the notion of legality does not exclusively adhere to the law, underlines this thesis with yet greater emphasis. At the same time it cannot be argued that when the notion of legality is construed so as to imply the observance of the legal rules (in the first place the normative Acts promulgated by the central authorities) then constitutionalism is necessarily included in this category. Still in the hierarchical order legality including constitutionalism is a notion of a degree higher than the notion of legality in the narrower sense, i.e. legality not including constitutionalism.

6. NORMATIVE ACTS OF THE SUPREME REPRESENTATIVE ORGAN OF STATE POWER PROMULGATED IN A NON-STATUTE FORM

The statute law is not the only possible form of the Acts of the supreme organs of state power. However, it is the most important normative, or act, of the said organs. During the past years the Supreme Soviet

of the Soviet Union called into life Acts by the names of Resolutions (*postanovleniye*), Declarations (*zayavleniye* and *deklaratsiya*), and Appeals (*obrashcheniye*).[38] Statute No. 107 of 1960 of the Czechoslovak Socialist Republic (on the standing orders of the National Assembly of June 12, 1960) speaks in its Sec. 18 of the 'Resolutions of the National Assembly'. The Seym decree No. 143 of 1957 of Poland (on the standing orders of the Seym, of March 1, 1957) in Articles 50 and 51 mentions 'Seyms decrees' in addition to statutes.—The Bulgarian decree of November 4, 1958, in Section 43, refers to the resolutions and declarations of the Popular Assembly.—On the whole, in many of the socialist countries the supreme organ of state power, in addition to laws, institutes Acts known by other names or designations. During recent years the normative activities of the supreme organs has become particularly variegated.

In Hungary the non-statute type of Acts of the National Assembly uniformly bear the name resolution. Although the Constitution speaks of resolution, still in our opinion not in a sense permitting an inference to a different type of Acts (clause (2) Sec. 15). This is evident from the wording as before and after the critical passage the Constitution speaks of laws. This suggests as if originally the legislator had a resolution (resolve) in the matter of a statute in sight. Eventually in Sec. 45 of Resolution No. 2 of 1956 of the National Assembly on the standing orders the resolution has been taken up as a special type of legal Act, whose promulgation is not obligatory (obviously on the understanding that it has not necessarily a normative content). When nevertheless, owing to its content it is promulgated, then it will differ from a law at both the signature and the promulgation. As a matter of fact a law is signed by the president and the secretary of the Presidential Council of the People's Republic, whereas it is the chairman (speaker) of the National Assembly and the recorder

[38] For example, in Session III, June 1950, the Supreme Soviet issued a declaration on the prohibition of nuclear armament; in Session IV, February, 1955, a declaration to all legislatures of the world, in the Jubilee Session of November, 1957, the Supreme Soviet issued an appeal to 'the peoples of the Soviet Union' and to 'the workers, political and social factors, the representatives of science and education, to the legislatures and governments of the world', in Session VII, August 1966, the Supreme Soviet issued another declaration on the strengthening aggression of American imperialism in Vietnam.

on duty who sign the resolution. The president of the Presidential Council of the People's Republic takes care of the promulgation of the statute, whereas it is the function of the Chairman (speaker) of the National Assembly to make public a resolution. It is remarkable how carefully the standing orders differentiate between the promulgation of a statute and the 'publication' of a resolution (Sections 44 and 45). This differentiation is revealing, as apparently from the term publication it stands to reason that in conformity with the standing orders, a resolution is not a normative act binding on the citizens (in Hungary also on aliens and displaced persons resident in the country).

In practice the resolution of the National Assembly may be classified as (a) such of a normative content that again are split into three categories, viz. resolutions binding also on the citizens, those binding only on political agencies, and those binding on the National Assembly itself; (b) such passed in individual cases, applicable to its own functioning, or outside it; (c) such granting or denying approval (these are associated with the activities or normative Acts of other agencies); (d) declarations (in general of foreign affairs).[39]

It is a generally accepted position in the Hungarian discipline of constitutional law that the National Assembly shall pass normative rules also binding on the citizens in the form of a law.[40] A line of demarcation drawn in this sense would be of significance in establishing the hierarchy of the sources of law. The law is the appropriate form also because it may contain sanctions, whereas the form of the resolution precludes the incorporation of sanctions. It is this deficiency which turns such an Act of normative character almost into a *leximperfecta* (the term is used merely to give an idea of the situation), and for this reason in certain cases renders its enforcement questionable.[41]—Incidentally, also the postulate of legality demands

[39] Among the resolutions promulgated between 1962 and 1967 two come within group (a), twelve within group (b), six within group (d). Group (c) has been omitted, because resolutions of this group are not published by the National Assembly.

[40] Cf. J. Beér in Beér, Kovács and Szamel, *Op. cit.*, p. 271.

[41] These differences render the position taken by L. Szamel unacceptable. According to him, in the hierarchy of the sources of law "the normative resolutions of the National Assembly and the statute laws are of equal rank, the only difference being their subject-matter".—Beér, Kovács and Szamel, *Op. cit.*, p. 99.

in a clear-cut manner that each political organ should pass its Acts within its own competence and in the form decreed by the law. The frequent change of forms or types of Acts, further, their not too consistent application are apt to produce uncertainty in the citizens, whether or not an Act is binding on them.

For want of a consistent regulation the actual practice of the National Assembly has created an altogether different situation. We are acquainted with the type of normative resolutions of the National Assembly which present normatives also to the citizens (here the Resolution No. 8/1958–1962 should be remembered on the conditions in agriculture and the tasks facing us), although, contrary to Szamel, we do not consider the examples he takes from the standing orders such that come within this category.[42] It cannot be argued that whenever a resolution of this type is passed, the citizens are bound to observe it in the same way as the provisions of the statute laws. This is the will of the National Assembly which is confirmed also by the fact of publication.

Of the category of normative resolutions which are binding on the State, and also on the social organs, we have to state that these resolutions are (as Szamel correctly pronounces),[43] legal provisions, and to be more precise provisions occupying a place next to the law in the hierarchical order of the sources of law. It is in this manner that Resolution No. 1 of 1956 of the National Assembly obligates all political and social organizations to assist the members of Parliament in their activities, give them any information they may require, and help them in the discharge of their functions (IV/3), and calls on the Council of Ministers to draw a bill on the elections to the National Assembly through the Minister of Justice (V/2). Going even beyond the Constitution Sec. 31 of Resolution No. 2 of the National Assembly binds the president of the Supreme Court and the procurator general to render account to the National Assembly of their activities once in the year. National Assembly Resolution No. 10/1958–1962 authorizes the Government to sign the German peace treaty. Such and similar provisions occur in a fairly large number in National Assembly resolutions.

[42] L. Szamel, *Op. cit.*, p. 49.
[43] *Ibid.*

Furthermore, of a normative content are those resolutions which regulate the domestic order of the National Assembly. Among these the most prominent are the standing orders of the National Assembly, the supreme representative organ of state power (in Hungary Resolution No. 2 of 1956; in Bulgaria the Resolution of 4th November, 1958 of the Popular Assembly; in Poland the decree of 25th December, 1957; in the Rumanian Socialist Republic the standing orders of December 22, 1965; in Albania the Resolution of June 2, 1958).[44] —The Hungarian standing orders contain provisions governing the Constitution of the National Assembly, its organization (chairman or speaker, recorders, committees), its sessions, debating order, questioning, the operations of the committees and the bureau of the National Assembly; the Bulgarian Resolution deals with the Constitution of the Popular Assembly, and the election of the supreme organs of the State, the committees, the meetings and sessions of the Popular Assembly, the tabling of bills, draft resolutions and declarations, the debates, division, and questions.—The standing orders of the Polish Seym bring under regulation the position of the representatives, the organs of the Seym (presidium, council of seniors, committees, secretaries), procedure to the Seym (sessions, sittings, election of the State Council, the appointment of the Government, passing statutes and resolutions, approval of decrees, questions).—The Rumanian rules of operation bring under regulation the sessions, their convention, duration, the supervision of the lawfulness of polling, the bureau of the Great National Assembly, its committees (permanent and other), the agenda of the sessions, working order, and sittings, the election of the State Council, the Supreme Court, the procurator general, the tabling of bills, divison, information, questions, the minutes, publication of the debates and immunity.—The Albanian resolutions deal with the convention of sessions, agenda of the inaugural sitting, attestation of the mandates of the delegates, the bureau of the Popular Assembly, the committees, sittings, tabling of bills, and the passing of legislation, questions, divison, the immunity of the delegates and their duties, the election of the Presidium and the appointment of the Government.

[44] The Czechoslovak standing orders, or more accurately, the order of debate and work, has been enacted as law No. 107 of 1960.

The standing orders bring under regulation, with a few exceptions, largely the same subjects. Although they mostly regulate the internal activities of the supreme representative organ of state power, often they may have an influence also on the activities of other agencies (as mentioned above). The proportion of regulations extending to organs other than the National Assembly varies by country. It is evident that the normative character of the standing orders has an effect not only inwards, but also outwards, on other organs. Nor can it be argued that the resolutions, practically in each section, contain normative provisions. These two traits are most characteristic of the resolutions of the supreme representative organ of state power.

The standing orders are not the only form of internal resolutions. While the standing orders settle the order of the activities of the supreme organ, and its organizational problems—in an all-embracing form—for a long term, there is need for internal resolutions for short terms, for deciding a few matters relating to the domestic order of the organ. A resolution of this type was in Hungary Resolution No. 1 of 1956 on the operations of the National Assembly and the representatives, or No. 5 of 1958 on the dissolution of the National Assembly. The former is an enactment of some length, of five sections, of which the first defines the general line of conduct, or policy, of the National Assembly in the light of the principles of socialist democratism, the second section analyzes the guiding and supervisory activities of the National Assembly, the third the improvement of the operating methods, the fourth defines the rights and duties of the representatives on new lines, and the fifth, last section contains actual measures part of which are binding on external organs. Hence not even in this case we have pure internal resolutions, although at least 80 per cent of this normative Act is absorbed by provisions governing activities which are properly those of the National Assembly. Still as regards the second resolution, this does not affect other organs directly, although it implies the duty of the Presidential Council of the People's Republic to call new elections within three months reckoned from the dissolution (clause (4) Sec. 13 of the Constitution). Naturally a resolution of the National Assembly can never include a direct command.

The second, larger group of the resolutions consists of specific resolutions. These are legal Acts, too, yet void of a normative content. In general these resolutions apply to the creation of some sort of an

agency, or to the election to some sort of a function coming within the competence of the National Assembly. The group is in general divided into two parts, viz. into the part comprising internal specific resolutions, and into the part of external specific resolutions. There have been plenty of examples for both types in the past years. Examples for internal resolutions are Nos 1/1958–1962; 1/1963–1967; and 1/1967–1971 on the elections of the officers of the National Assembly, or on the agenda of the session passed in the first sitting of the session. An external resolution is that No. 2/1958–1962, on the election of the Presidential Council of the People's Republic; No. 3/1958–1962 on the confirmation of the Hungarian Revolutionary Workers' and Peasants' Government; No. 6/1958–1962 on the election of the lay assessors of the Supreme Court; No. 11/1958–1962, on changes in the personal composition of the Presidential Council of the People's Republic; No. 12/1958–1962 on the election of the deputy president (chairman) of the National Assembly; further of recent years, Resolution No. 4/1967–1971 on the election of the Presidential Council of the People's Republic; and No. 5/1967–1971 on the election of the Hungarian Revolutionary Workers' and Peasants' Government. Resolutions of this type do not contain normatives, although in the majority of cases there may be in the background an implied command to the elected agencies to take up their operations and make use of the rights the law has assigned to their competence. Nevertheless these Acts cannot be considered normative ones they are in fact specific as regards their character.

The promulgation of specific Acts is not obligatory in all circumstances. Moreover, most of these Acts are never published, as they lack a normative effect. In Hungary, in conformity with established practice, resolutions of a personal nature which may interest the majority of the public are as a rule published. However, this publication is of an informative character only, for while the earliest date on which a normative Act otherwise becomes effective is the day of publication (or promulgation)—as a presupposition of its enforcement is that the citizens or the governmental agencies should be informed of it—the date on which a specific resolution becomes effective (unless decision to the contrary has been taken) is the day of its creation, i.e. in corporate agencies the establishment of the results of voting; at special, unipersonal agencies, the date on which

the resolution has been expressed orally, or in writing. It follows therefore that the validity of a resolution of National Assembly in special matters does not attach to its publication. The publication serves merely for the information of the public.

The third group of the resolutions of the National Assembly is that associated with approvals. Similarly as all other supreme representative organs of state power in the socialist countries, in the Hungarian People's Republic National Assembly supervises the activities of the central agencies, moreover, certain governmental Acts have to be submitted to it for subsequent approval. Section 48 of the Constitution of 1936 of the Soviet Union declares: "The Presidium of the Supreme Soviet of the USSR is bound to render account of its operations to the Supreme Soviet of the USSR."—Section 58 of the Albanian Constitution even goes further and declares: "The Presidium of the Popular Assembly . . . (3) decides on the constitutionality of the statutes; this resolution requires the subsequent approval of the Popular Assembly; . . . (6) issues regulations; if these resolutions contain legal provisions, they have to be submitted to the next session of the Popular Assembly for approval . . ."—Article 26 of the Polish Constitution obligates the State Council to submit law-decrees issued between the sessions of the Seym to the next session for approval.—Clause (2) Section 64 of the Constitution of the Rumanian Socialist Republic declares that the legal rules of the State Council having the force of a law have to be submitted to the next session of the Great National Assembly for ratification.

The socialist discipline of constitutional law assigns this activity to the supervisory competence of the supreme representative organs of state power. So does, e.g., Rozmaryn, who emphasizes the reduced substitutive authority of the State Council since 1957, and also that between sessions of the Seym the draft decrees are also examined by the one committee of the Seym or the other. At the same time the presentation of decrees is still obligatory. The decrees may be approved by a simple resolution of the Seym, whereas for their annulment or amendment a separate statute is needed.[45] However, this question emerges only in connexion with the approval of the law-decree type Acts.

[45] Stefan Rozmaryn, *Sejm und Volksräte in der Volksrepublik Polen*, Warsaw 1961, pp. 49–51.

Here the situation is somewhat similar in Hungary. In corformity with the Constitution the following subjects come within the approving competence of the Hungarian National Assembly: the account of the Presidential Council of the People's Republic on its activities (clause (2) Sec. 21); the account rendered by the Council of Ministers on its operations (clause (1) Sec. 27); and the account rendered by the procurator general (clause (2) Sec. 43).—Paragraph II/4 of Resolution No. 1 of 1956 of the National Assembly declares that the President of the Supreme Court and the procurator general are bound to render account to the National Assembly at least once in the year. Consequently these accounts come within the approving competence of the National Assembly. Approval or the denial of approval is the result of the procedure of the National Assembly. Since here this is not a case of examining a single legal Act, but of investigating into the activities as a whole of an organ, the approval simply means that the National Assembly is in agreement with the general activities of this organ, without, however, identifying itself with each separate Act. There is no obstacle whatever to the resolution's completing the simple Act of approval by commenting in detail on the activities of the organ submitting the account.

In this connexion it is worth while noting that during recent years Soviet literature on constitutional law mentions also other forms of approval. It is the case of Acts of approval which serve the sanctioning of normative, or legislative Acts of the social organs.[46] However, approvals of this type are the least usual within the sphere of activities of the Supreme Soviet. It occurs mainly in the practice of the Presidium and the Council of Ministers. Although this sort of approval may have a function, it should be noted that Soviet experience demonstrates rather that the social organization take charge of the political functions in such a form that no further approval or sanctioning is required. In Hungary neither the Constitution, nor constitutional practice recognizes this form of approving resolutions by the National Assembly.

Finally, there is a fourth group of resolutions of the National

[46] Cf. (V. N. Gorshenev) В. Н. Горшенев, Санкционирование как вид нормотворческой деятельности органов Советского Государства (Approval, as a kind of legislative activities of the organs of the Soviet State), *правоведение 1959*, No. 1, pp. 11–8.

Assembly, viz. that of declarations. These are not normative in the conventional meaning yet not of a specific character. They may appreciably influence the activities or political line of smaller or larger groups of governmental agencies, or even of all of them, still they do not include legal provisions. In Hungarian practice, which on the whole agrees with that of the other socialist States, these declarations deal with, or touch, questions of foreign policy (so e.g. Resolution No. 4 of 1958, on the appeal of the Supreme Soviet of the USSR on the stoppage of nuclear tests; further the resolution on the prevention of the armament of the German Federal Republic with missiles and nuclear weapons; Resolution No. 4/1958–1962 on the German peace treaty; No. 5/1958–1962 on the appeal of the Supreme Council of the Soviet Union on disarmament, to the legislatures and governments of all States of the world; further, partially Resolution No. 7/1958–1962 on the foreign policy of the Hungarian Revolutionary Workers' and Peasants' Government, which at the same time also includes the approval of the foreign policy of the Government; of recent years Resolution No. 6/1967–1971 on the problem of European security, and No. 7/1967–1971 on the Near-Eastern crisis). The resolutions of the National Assembly in the form of declarations are reflections of the ramified activities of the supreme representative organs of state power in the socialist countries.

Legal Acts of the National Assembly of necessity extend to a wide scope and are manifold. This is inevitable because in a socialist State this organ occupying a position on the summit of state power is not merely a legislative organ, it is not isolated from other agencies. The manifoldness of the legal Acts for their content, and consequently also for their form, has to be attributed to the fact that the Diet and the corresponding organs of the other socialist States express the popular will, i.e. create a legal provision on the ground of the authority conferred on them by the working people. In addition, the legislature is the master of the governmental mechanism as a whole, because the creation of governmental organs is tied directly or indirectly to its Acts. At the same time the legislatures are the supreme supervisory organs which keep an eye on all political and social activities.

From the point of view of legal Acts this justified segregation cannot permit a formal commingling of the Acts, or such of content. Therefore it is correct and even necessary to draw clear-cut lines

between the different functions of the supreme representative organs of state power, and to segregate these functions. Furthermore, the types of Acts of the supreme organ of state power has to be shaped so as to suit these functions. There is no doubt that by this contribution is made to legal security and consequently to socialist rule of law.

7. COMPETENCE OF THE LOCAL REPRESENTATIVE ORGANS OF STATE POWER; THE NATURE AND THE FORM OF THEIR NORMATIVE ACTS

The discussion of the legal Acts of the supreme representative organ of state power is closely associated with the position this organ occupies within the organization of the socialist State. In the shaping of the Acts the competence of the organ on the summit of state power is unique in its character mostly for the reason that this organ may exercise all rights following from popular sovereignty, although at the same time it allows a share in these rights also to other agencies (central and local). It stands to reason that at organs where the bifurcation of general and reserved competence does not emerge, the structure of the system of governmental rules will necessarily become less complicated. In connexion with organs which have no general or full competence following from popular sovereignty we may speak of a reserved or delegated competence, or functions. In Chapter Two of this work it has been attempted to define a position in relation to the origin of the competence of the councils, the local representative organs of state power. This set of problems has to be completed in one sense in order to throw light on the legislative competence of the councils.

So far the competence (jurisdiction) of the councils has not been defined in most of the socialist countries. Instead the statutory provisions have defined the sphere of functions of these organs, which as is known is a somewhat vague answer to the question, and marked out the trends in the operation of the local organs of state power in their general features.[47] It has been widely argued both in Hungary

[47] Law No. 69 of 1967, of the Czechoslovak Socialist Republic departs appreciably from this solution. In this statute law an attempt has been made to define the competence and liability of the agencies of the national committees

and in other socialist countries whether a uniform and comprehensive settlement of the competences was possible at all. Since the operating capacity of these organs is of extreme importance, the question can hardly be answered in the affirmative. There remains therefore that in the course of a regulation of the competence of the councils—besides the general regulation of the scope of functions—there should ensue a statutory regulation of the exclusive competence. Thus the local organ of state power progresses on a dual track, viz. the track indicated by the exclusive competence, which therefore may be entered by no other organ, not even by the executive committee, and the other track which has in a similar way been brought under regulation by legal provisions of a higher order, by defining the particular functions of the organ. In this latter instance the sphere of activities is defined in a rather vague form, in an expandable as well as restrictable manner. In most of the cases the spheres of functions are enumarated in a way that sufficient elbow-room should be allowed for the solution of the manifold problems of ever changing life.

The dual settlement, which has already been encountered in a number of legal provisions,[48] ties down and at the same time relaxes, the competences of the local representative organs of state power. On the one side there are the rights which may be exploited exclusively by the councils and therefore the councils are under an obligation to discharge these functions themselves. On the other hand as a rule there are only guiding principles, which in the majority of cases express that the councils have to solve problems of a characteristically local nature. In the corresponding legal provision of almost all socialist States the general statement may be discovered that the local representative organ of state power conducts its local social, economic, cultural, etc. activities within its competence.[49] This section of 'general

by stages and types of agencies. It is characteristic of the spirit of the regulation that the most extensive enumeration has been given for the competences of the plenums, and the narrowest for that of specialized departments.

[48] So, e.g. in the Rumanian Socialist Republic in sections 14, 15, 16, 17, and 18 of the Law of December 28, 1968 on the organization and operation of the people's councils.

[49] So Article 3 of the Law of June 25, 1968 of the Russian Federation on the rural and settlement soviets; Section 6 of the Rumanian Act on people's councils; Sec. 2 of the Czechoslovak Act on national committees; clause 1, Article

authority' makes it clear that on the ground of the socialist constitutions the legal provision impose obligations on the local agencies by virtue of which these have to tackle problems of local interest within the sphere of their competence, irrespective of whether they have been vested with exclusive competence for these problems, or whether such matters are expressly enumerated in a legal provision at all.

This statement is of importance because in socialist jurisprudence, so in Hungarian too, there are doctrinal positions whose maintenance and enforcement would in the governmental practice paralyze the activities of the local agencies, in particular their normative work. L. Szamel, who gives expression to this idea, writes in *A jogforrások* (The sources of law) of the by-laws of councils as follows: "Although their promulgator is a local agency of state power and so . . . it is an Act of state power, still it is in no way related to a law . . . in the legislation of the councils the element of popular sovereignty is not present. . . . They have not . . . even a local sovereignty in consequence of which their legal rules have to be traced back to a central legal rule."[50] Here the trend of thought is assailable at a number of places. In the first place we cannot agree with the lack of the elements of popular sovereignty. Two things should not be left out of consideration, viz. (i) the fact that the organ occupying a place on the summit of state power, is, as the organ directly elected by the population

3 of the Polish Act of January 25, 1958, on the people's councils; clause (2) Sec. 1 of the Hungarian Act X of 1954, etc.

[50] L. Szamel, *Op. cit.*, pp. 53–4.—Essentially the same position is taken by I. Benditer, who denies that the Rumanian people's councils have a right to formulate new rules of conduct in the form of legal provisions, in scopes left outside regulation. According to the said author such a right would violate the principle of the unity of legislation and the priority of statute laws. He declares that the only organ of legislation in Rumania is the Great National Assembly. Cf. I. Benditer, Natura juridică şi clasificarea actelor locale ale puterii de stat (Legal nature and classification of the Acts of local agencies of state power), *Analele ştiinţifice ale Universităţii Al. I. Cuza din Iaşi, Serie Nouă, secţiunea III. Ştiinţe Sociale, Vol. IV*, 1958, pp. 201–2.—This analysis does not penetrate sufficiently deep. As a matter of fact, it is known that not even as regards the central organs it is a privilege of the supreme representative organ of state power to create new rules of conduct. There is no privilege of the creation of legal provisions in this sense.

and expressing the will of the populations as a whole, the holder of the fullness of popular sovereignty, the organ giving potential expression to all rights originating from popular sovereignty; and (ii) since in reality it exercises part only of these rights, the governmental organs brought to life are in a similar way carriers of popular sovereignty. Each governmental organ gives expression to sovereignty, and under socialist conditions to popular sovereignty. It is this that confers the right of legislation, the administration of justice, and of the performance of all functions—which either a central or a local organ exercises. The fact that theoretically the supreme organ of state power gives expression to the plenitude of state power, i.e. of popular sovereignty, does not constitute a limitation for the other governmental organs. For practical purposes a given organ applies certain rights deriving from popular sovereignty.—If the advocates of the above doctrine understood by the exercise of popular sovereignty the manifestation of this exercise in legislation, even then nothing would justify the contestation of the exercise of popular sovereignty on the part of a number of organs, whose legislative character is accepted as natural. (Here the central organs of public administration should be remembered as well as the local councils, part of the local administrative agencies, etc.) Among these organs it is exactly the councils in whose creation the working people has a direct share (even if not in its entirety, still groups of the working people, with territorial delimitation).

Apparently the problem of the independent legislative capacity of the council depends on this recognition, i.e. the problem whether or not a council can create a legal rule binding on the citizens and the governmental organs without tracing back its legislative capacity to a central legal rule. In our opinion the general authority the Constitution—or the Council Act, or a corresponding statute law—of socialist States confers on the local councils, invests them with authority to solve problems of a local character. If L. Szamel considers this a central legal provision to which the regulation of the council has to be traced back, so we agree with him, for in no circumstances would we accept some sort of a doctrine of natural law in connexion with the competence of the local organs of state power. However, this is a ground which is too unstable to be relied on for guidance. If L. Szamel's argumentation is correctly understood, what

he exactly wants is that each regulation or normative resolution of a council should rely on the authority conferred on it by an actual central legal provision. "As a matter of fact in view of the centralized character of the State and at the actual stage of the growth of the legal system only the assumption can be accepted that when on a matter the central organs have promulgated no legal rule, they want to leave such matter intact" he writes.[51] —The constitution and also other statutory provisions almost prove the contrary of what L. Szamel writes, and make it an obligation of certain local governmental agencies to settle this important sphere of political life by the creation of legal norms. Consequently the only justifiable position is to infer that the legislative activities of the councils will of necessity manifest themselves in two instances, viz. (a) when the council issues a legal rule within its exclusive competence or by virtue of the express provision of another central legal rule, or (b) when the council settles a local question left unregulated by the central organs of state power.— In either case there appears in principle, to be an obligation on the part of the council to promulgate a rule.

It is a matter of practical consideration rather than one of theory that in the past the councils, in need of regulation, recognized the questions easier when a legal rule of superior order called their attention to it and it was more difficult for them to infer the want of regulation from the local circumstances, on their own initiative, without any express command. This has been an incorrect practice and can in no circumstances be justified by theoretical exposition.[52]

As for the system of the legal Acts of the local representative organs of state power it differs widely in the socialist countries. In

[51] L. Szamel, *Op. cit.*, p. 24.

[52] We are in agreement with the statements of the paper by K. Besnyő, A tanácsrendeletalkotás időszerű kérdései (Topical problems of the councils' decree-making activities), *Állam és Igazgatás* 1959, No. 4, pp. 285–95. — L. Szamel is in this respect mistaken in the first place because he fails to recognize the elements in the principle of democratic centralism and considers this principle such that primarily implies centralistic tendencies, and speaks of "the large-scale centralization of the creation of law" (*loc. cit.*). — This premise is false, as it is generally known that in the principle of democratic centralism centralism and democratism are manifested in conjunction. Anybody trying to separate the two will infallibly come to wrong conclusions.

certain countries the local agencies promulgate a single type of legal Act, whereas in others two types of Acts are in current use. Even this latter differentiation is not made according as an Act of the council is normative or specific. Consequently whenever a local Act of state power has to be analyzed in these countries (and so also in Hungary), the question should be put whether it is the case of a normative or a specific Act.

As regards the names given to the legal Acts of the local representative organs of state power, Article 2 of the Regulation of Rural Soviets of the Russian Federation of September 12, 1957, and Article 3 of the Byelorussian Regulation of October 23, 1957 speak of resolutions and decrees (*resheniye* and *rasporyazheniye*). No clear-cut line has been drawn between the two.—Both Tikhomirov[53] and Umanski[54] are equally of the opinion that the soviets as corporate bodies can but pass resolutions. The decrees are Acts of operative activities, and such are as a rule issued by the executive committee. Hence the resolutions may be normative or specific. Article 26 of the Byelorussian Regulation declares that these resolutions have to be communicated to the institutions, enterprises and organizations concerned within twelve days.

The Polish Act No. 16 of 1958 on the people's councils (January 25, 1958) speaks in connexion with the Acts of the councils only of resolutions, in the event of both specific and normative Acts (Articles 35 and 36). The Bulgarian statute law on people's councils (November 2, 1951) speaks of resolutions and decrees (paragraph 9) and declares that resolutions are passed by a people's council having the quorum (the presence of two thirds of the membership) by simple majority. The statute law of the German Democratic Republic of January 17, 1957 on the local organs of state power deals only with resolutions (*Beschluss*; clause (3) Sec. 5). The Rumanian Act of 1968 mentions people's councils and the resolutions of the people's councils (Sec. 24). Act No. 69 of 1967 of Czechoslovakia on the national committees declares that "the national committees are authorized to issue generally

[53] Ya. A. Tikhomirov, A helyi államhatalmi szervek további fejlődésének néhány kérdése a Szovjetunióban (Some problems of the further evolution of the local organs of state power in the Soviet Union), *Állam és Igazgatás* 1960, No. 8, p. 594.

[54] Ya. N. Umanski, *Op. cit.*, pp. 328–9.

binding decrees" (Sec. 12). In urgent cases even the council of a national committee may issue a decree, which becomes ineffective if the national committee in its next plenary sitting refuses to approve and reserve it for the next plenary session to promulgate generally binding decrees (para 1 clause (2) Sec. 39).

Hence the regulations enacted in connexion with the legal Acts of the local representative organs of state power of the socialist States are more or less variegated. As it is, reasons of policy account for the differences. The fact that in a given country there may be either a bifurcation or a uniformity of the Acts of the local agencies, determines the extent of the legislative faculty of the councils. Consequently in a following comparative analysis of the problem a special question will be the exploration of the effect of the duality, or uniformity, of normative regulation, on the effectiveness of the Acts binding on both the governmental organs and the citizens.

8. DECREES OF COUNCILS

Hungarian statutory regulation has been formulated with clarity already in the Constitution; at least in one respect, as although clause (3) Sec. 31 speaks only of the 'local decrees' of the councils, clause (4) of the same section mentions the decrees, resolutions and dispositions of the councils. The Second Council Act (1954) speaks of resolutions and decrees (clause (1) Sec. 8) which "cannot be at variance with legal rules issued by the superior organs of state power or public administration". Hence Hungarian legislation has adhered to the system of bifurcation (subsequent legislation has not recognized dispositions as Acts of the councils, and in general they are understood as oral acts, whose issue is accompanied by the obligation of immediate enforcement).

According to Hungarian statutory regulation, the Acts of greatest significance of the councils are the decrees of councils (in the words of the Constitution: local decrees; or, according to Sec. 28 of Act I of 1950: by-laws). The First Council Act (1950) restricted their creation by affording an opportunity for this type of regulation only "in particular within the sphere of the enforcement of statute laws and regulations of a higher order." Regulation No. 254/1950 M.T., in its Sec. 23, omitted this passage and directed attention to the sphere of an independent creation of by-laws of the councils.

The Second Council Act (1954) abolished the notion of a by-law (which does not occur in the constitution either), and substituted for it the notion of the decree of council. Undoubtedly beyond the simple difference in designation the change has another significance. The notion of by-law rooted in the bourgeois idea of local government. The administrative machinery, grown up in the old traditions, even after the introduction of Act I of 1950 thought that the legal Acts of the councils had to be created on the former patterns and by former methods. Since, however, the scope of operation of the councils had radically broken away from that of earlier self-government, the transmittal of the notion so to say rendered the legal Acts of the local organs of state power unsuitable for the regulation of economic, cultural or organizational functions. The introduction of the term decree of council by the Second Council Act (1954) had as its objective (at least this position crystallized at the preparatory stage) to have the normatives of the council established in this 'decree of council' form. This idea could by no means have been easily realizable, nevertheless it was not without foundations. In the course of the enforcement of Act X of 1954, for the very reason that the Second Council Act (1954) included no prohibitive provisions in the sense that a resolution could not be of a normative character, moreover by enumerating certain limitations in other respects in Sec. 9, it seemed to support the opinion that also a resolution could be normative, so the practice as outlined above could not attain full growth. The decree-making activity of the council is relatively narrow, mainly because the supervision of the expendiency and the legality of the decree by the superior organs is by far more rigorous than that of resolutions.

Effective Hungarian statutory regulation on decrees and resolutions is taken up in Act X of 1954 and in Law-decree No. 44 of 1957. The Second Council Act (1954) distinguishes a decree from a resolution in the sense that only a decree of council can establish rules of conduct affecting the rights and duties of the population.

The decree of council is a normative act or statutory provision which is binding on the citizens, and whose sanction may be a fine. As a matter of course the sanctions are milder than those decreed by laws or other legal rules of higher order. In point of fact already for its content a decree of council is not so significant a rule of conduct

as a statute law. On the other hand for citizens domiciled or resident in the venue of the council they are as binding as any other legal provision. However, its obligatory character cannot be derived from a legal rule of superior order, but merely from itself, which expresses the rights implied in the authority of the councils.

Owing to its character a decree of council has to be promulgated in a way that the citizens should become acquainted with the provisions or rules binding them. Of the promulgation, clause (5) Sec. 9 of the Second Council Act (1954) declares that this has to take place 'in a locally usual manner'. Among others the decrees of a county council are as a rule promulgated in the circular published by the executive committee of the council. As regards communal decrees of council the objective is mostly achieved by posting them up. This is the usual way to make the population acquainted with them. Unless otherwise decreed the council decree becomes effective on the day of promulgation.

However, promulgation is preceded by the submission of the decree to the council of superior order. Since in conformity with clause (3) Sec. 9 of the Second Council Act (1954) the decree may be promulgated on the expiry of fifteen days reckoned from the date of submitting it to the superior council, the superior council or the executive committee will have to act within this term in the event it is intended to prevent a decree conflicting with the law from becoming effective. If during the term between two sessions of the superior council the executive committee shall come to the conclusion that the decree infringes a statutory provision or a rule issued by the superior agencies of state power or of public administration, it may suspend the enforcement of such decree. The superior council may in its sitting rescind the decree or amend it—within the specified term or, in the event of suspension, it can do it at its next sitting. When neither of these takes place within fifteen days reckoned from its being submitted for approval, the decree becomes tacitly valid.

In Hungary during recent years the decree-making activities of the councils, and in particular of the communal councils, have achieved marked significance. The statistics given in the paper by Károly Besnyő quoted above are most characteristic. Accordingly, in the first quarter of 1959, 16 county, 7 municipal and 186 communal council decrees were promulgated (in 1958 the county and municipal councils figure

with 47 decrees).[55] In particular during the years following upon the enactment of the Second Council Act (1954) the promulgation of decree was promoted by the issue of specimen decrees of council (within a year thirty specimen decrees were issued in particular in the sphere of communal and municipal economy).—The compilation by Károly Besnyő of the decrees promulgated in the first quarter of 1959 is fairly interesting. On a national basis more than ten decrees were promulgated on each of the following subject-matters: the cleaning of public domain (57), protection of cause-ways, trees, trenches (20), regulation of public markets (13), garnering of cornstalks (15). Other subject-matters of decrees: keeping of domestic animals, tasks of communal policy, functions of night watchmen, compulsory inoculation of poultry, communal planning regulation of soil exploitation, the use of mortuaries, banning tractors from particular roads, the use of weigh-bridges and carrion pits, water supply, use of public domain, pasture, announcements by drumming, spraying of fruit-trees, use of TV sets in cultural centres, etc.[56]—The classification of decrees of council in the paper by Károly Besnyő is also of interest.[57] Accordingly the decrees may be divided into two types, viz. (a) those governing the operations of the councils or their subordinate specialized agencies (settling questions and complaints), and (b) those purposing the achievement of social, economic and cultural targets within the competence of the councils.—It should be noted here that although the decrees of type (a) are also normative, still in most of the instances they do not affect the rights and duties of the citizens.

The normative character of the council decrees cannot be argued. In Hungary only such decrees have been enacted that contain normative provisions and in the majority of cases also hold out sanctions. It is not here that the differences in the discussion and in practice become manifest, but in connexion with the character of the resolu-

[55] It is also characteristic that during the first four years of the council's system, among the 34 communal councils of the Kisvárda district (County of *Szabolcs-Szatmár*), altogether two have issued decrees. Cf. I. Józsa, A községi tanácsok rendeletalkotási jogáról (The decree-making right of communal councils), *Szabolcs-Szatmári Élet 1961*, No. 4, p. 9.

[56] K. Besnyő, A tanácsrendeletalkotás időszerű kérdései (Topical Problems of the Council's Decree-making activities), *Állam és Igazgatás* 1959, No. 4, pp. 290–1.

[57] *Ibid.*, p. 293.

tions of councils. It has not been argued that exactly owing to their character the council decrees occupy the highest order among the legal Acts of local organs in the hierarchy of legal rules.[58] The question (so far of little practical significance) is how and by what procedure a decree of council can be amended, and whether it could be enforced in the form of a resolution of council. This has not yet been settled in either legislation or literature. In our opinion the only method by which a decree of council can be amended is one that in all its details conforms to the original procedure. Hence a resolution of council cannot be passed in the matter of amendment of a decree, and the new Act has to be submitted in the same way as the earlier to the council of superior order. Except cases of suspension, annulment or amendment, the new decree may be promulgated on the expiry of the term of fifteen days in the same way as the original. If there were no such limitations the legality of these decrees could be jeopardized.

Mention has to be made here of a special form of local legal rules, viz, the statutes discussed in the Yugoslav and Czechoslovak doctrine of the sources of law. In conformity with Section 98 of the Yugoslav Federal Constitution "each commune draws up its statutes independently" and defines in them its rights and duties and the method to enforce them.— Under clause (4) Sec. 25 and clause (5) Sec. 26 of the Czechoslovak Act of June 29, 1967 on national committees, the communal and municipal national committees may issue statutes defining their organization and competence. All these provisions present a rather comprehensive form of regulations, which, slightly distorted, may be termed the 'local constitutions' of the lowest order of territorial units, necessarily with limitations in many respects (perhaps the least in Yugoslavia where the communal idea prevails).

9. NORMATIVE RESOLUTIONS OF COUNCILS

As has already been made clear, in comparison with the decrees, the resolutions occupy a lower stage in the hierarchy of the legal provisions. It was also shown that there are two categories of resolutions, viz. normative and specific. The latter is void of general rules.

[58] Cf. L. Szamel, *Op. cit.*, p. 53.

Even a third may be added to these two, namely the resolution void of legally relevant measures at all (e.g. a resolution passed in commemoration of a deceased council member). Of these most important is the category of normative resolutions. The addressee of the normative resolution of the council differs from that of the decree. A resolution of the council cannot be binding on the citizens, still it may include dispositions concerning agencies or enterprises subordinate to the council. The agencies or enterprises are responsible for the observance of the normative Acts of the council, and their executives are subject to disciplinary procedure. In this case the council takes action against the defaulter as his supervisor. The resolution of the council has not to be submitted to the superior council. The minutes containing the resolution has to be forwarded to the executive committee of the superior council. The council itself determines the date of the coming into force of the resolution. Incidentally the Hungarian regulation (Resolutions Nos 16 and 17 of 1954 of the Presidential Council of the People's Republic) settled with great care the method of promulgating the resolutions. The executive committee is bound to forward the resolutions of the council to the council members within five days following upon the council meeting, for communication to the electorate. In any case the executive committee has to take action in order to make the population acquainted with the resolutions of the council, and to obligate the responsible agencies to enforce the resolutions.

Above mention has been made of the relation between a decree of council and the resolution of same. Essentially the resolution holds a lower position in the hierarchy of legal rules than the decree, even in the event when the former is of a normative content.[59] On this consideration the non-normative resolution constitutes no problem, as it includes no legal rules.

It should be noted that there is a divergence of opinions as to the addressees of the resolutions of the councils. While there is complete agreement in the event of decrees of council, as the legal rule is often an embodiment of the competence of the council as authority (it being of necessity binding on the agencies not subordinate to the council), there are positions according to which the resolutions of

[59] Beér, Kovács and Szamel, *Op. cit.*, p. 100 (Szamel) and p. 382 (Kovács).

the council are not binding on agencies operating in the territory of the competence of the council, not subordinate to the council.[60] Still this position is not supported by a legal rule. It is true that Section 2 of Resolution No. 11 of 1955 of the Presidential Council of the People's Republic decrees the provisions of the council as authority to be binding on agencies not subordinate to the council. However, this does not alter the situation that actually for want of a statutory prohibition the councils often assert their authoritative competence in the form of a resolution. There is no better proof to confirm this than the fact that 75 of altogether 300 resolutions passed by the county councils in 1959 dealt with the activities of agencies not subordinate to the council, and in this connexion contained enforceable provisions.[61] In our opinion the actual hierarchical order of legal rules and the failure of the Second Council Act (1954) to define the form of the normative Acts of the council with accuracy, of necessity have introduced a certain obscurity in the relationships of agencies not subordinate to the council. Practice is uniform, for the councils touch on the activities of non-subordinate agencies in the first place in their resolutions. The statistics of 1959 confirm that with the exception of the council of the County Hajdu-Bihar all other county councils passed resolutions of such and similar content.

As regards the subject-matters of the resolutions of the councils during recent years the picture was rather variagated. The survey of the resolutions of the county councils included in the paper by Károly Besnyő deserves attention.[62] Accordingly in 1959 the largest number of resolutions were passed in matters affecting popular control (38), the budget (41), farm-work (27), territorial organization and the operations of the councils (each 24). The comparative table shows that in their majority the resolutions of the councils were passed in matters in respect of which the superior governmental organs instructed the councils to issue resolutions. At the same time an insignificant number of their resolutions related to the operations of councils of lower order as well as to traffic, taxation, plan and

[60] *Ibid.*, p. 382 (Kovács).

[61] K. Besnyő, A megyei tanácsok határozatai (Resolutions of the county councils), *Állam és Igazgatás* 1960, No. 6, p. 442.

[62] *Ibid.*, p. 443.

commodity supply problems (i.e. mostly to such subjects where own initiative would have been of greatest importance). There were only twelve counties where resolutions were passed in matters of communal policy, and only three counties dealt with public safety.

The problem of resolutions of council, in association with a few unsolved questions of the decrees of council is fairly unsettled. However, the gaps in legislation cannot be filled unless after an extensive investigation into practice an attempt is made to define the principles in this rather practical scope. Actually the mix-up of form and content of the legal norms has led to a drop in the authoritativeness of the norms. The postulate of local initiative and the development of socialist democratism admonish us to procede on this path by mending the irregularities.

10. ANNULMENT AND AMENDMENT OF THE ACTS OF THE LOCAL REPRESENTATIVE ORGANS OF STATE POWER

To conclude this chapter the problems of the annulment and amendment of the Acts of the local representative organs of state power have to be discussed. As a matter of fact a discussion of this set of problems will raise some interesting questions related to the hierarchy of the legal rules and the sources of law, on the one part, and the problem of a general regulation in the event of conflicts, on the other. Finally the relations of annulment and amendment will be reviewed. In this connexion the statement may be ventured that generally approved principles prevail in the constitutional law of the socialist countries and also in its discipline. Yet we often stumble upon contradictory solutions, whose elimination would mean the reinforcement of partly socialist democratism, partly legality.

In Hungarian constitutional law the earlier indicated apparent contradiction confronts us that in conformity with clause (3) Sec. 31 of the Constitution the decrees of council cannot conflict with statutes, law-decrees, decrees of the Council of Ministers, ministries and councils of superior order. On the other hand according to the Preamble of the Second Council act (1954) the councils "are subordinate exclusively to the superior organs of state power". It has already been made clear that in fact a contradiction is out of question here.

At the one place there is the case of the validity of Acts of superior organs within their own competence, at the other the fact stands that exclusively superior organs of state power can issue provisions in the matter of competence of the councils. There is a certain complexity here insofar only as, for want of a clear-cut delimitation of the competences, there are mixed competences, i.e. such as are exercised by both the central organs of public administration (often by specialized agencies) and the councils. In such and similar cases a conflict will arise. There is no doubt that the only remedy would be a precise delimitation of the competences.

What is quite clear is that in the hierarchy of legal rules the Constitution qualifies the regulations of the Government and the ministries, beyond the Acts of the representative organs of state power, as such standing above the Acts of the councils. It is in this sense that clause (3) Sec. 8 of the Second Council Act (1954) has to be construed, i.e. the provision which stipulates the annulment or amendment of Acts infringing the Constitution or other legal provisions. In our opinion here we have to remain within the scopes laid down by the Constitution, i.e. here the case is one of decrees issued by the organs of public administration. This is all the more so since the passage of the Second Council Act (1954) is an almost verbatim repetition of clause (4) Sec. 31 of the Constitution. It would be wrong to give an extensive construction to the passage of the Act here quoted. (It would be missing the point if the prohibition of conflict and consequently annulment or amendment of the Acts of the councils were made to extend to cases when the conflict is not one with the legal Act of a central organ of public administration of ministerial standing or of an executive committee of superior order, or of a specialized, de-concentrated agency.)

It should be noted that the problem of the hierarchy of legal provisions has been settled by a number of socialist countries with an accuracy greater than the above-quoted Hungarian provisions, and consequently more effectively. In conformity with Article 5 of the Act of the Russian Federation on rural and settlement soviets—as for the hierarchical order of provisions—resolutions and decrees of the constitutions of the Soviet Union and of the Russian Federation, their statutes, the law-decrees and resolutions of the presidiums of the supreme soviets of the USSR and the Russian Federation, the

decrees, resolutions of the respective councils of ministers, the resolutions and decrees of the soviets and executive committees of higher order are on a level above those of the local soviets (i.e. there is no question here, in either central or local relations, of the specialized agencies or of the government departments).—Clause (2) Sec. 5 of the Act of January 17, 1957, of the German Democratic Republic raises the statutes of the People's Chamber, the Council of Ministers and the superior representative organs and their decrees and resolutions to a higher level in the hierarchy of the sources of law.—Section 9 of the Bulgarian Council Act of 1951 provides accordingly as regards the Constitution, the statutes, the law-decrees and the resolutions of the Presidium of the Popular Assembly, the resolutions and decrees of the Government and the people's councils of superior order.[63]

In the Hungarian Constitution and the Second Council Act (1954), further, in similar provisions of a large number of socialist States the legal principle is dominant that, as regards the legal Acts or normatives of the local representative organs of state power, conflicts can arise only if there is a contradiction between these and the normative Acts of the superior representative organ of state power and the Government, or in general the organs of public administration of general competence. (When the competences are brought under regulation a situation may arise where a local organ passes a resolution in a matter outside its competence conflicting with a provision of a specialized agency. In both instances there is a case of Acts *ultra vires* and the want of competence invalidates the Act from the beginning. Here there is no case of a genuine conflict.)

What happens in the event of a genuine conflict? Naturally according to the principle of the hierarchy of legal provisions the legal Act of the organ of lower grade has to be amended. Here the amendment is an Act by which the conflict is lifted by the annulment or the change of the Act as a whole, or its part conflicting with a legal provision of higher order. In point of fact this would be the function of the representative organ of state power responsible for the infringement of the

[63] The statutory regulation of the Czechoslovak Socialist Republic departs from this line in many respects. Clause (2) Article 96 of the Constitution declares that all provisions of the superior state organs are binding on the national committees. This construction can be given to Sec. 73 of Act No. 69 of 1967.

legal rule. It follows as a matter of course that we cannot rely on such a settlement of the matter. The superior representative organ of state power has to be granted a competence by which it can prevent a violation of a legal rule not only in the event of a specific Act, but also in that of a normative Act. This competence would at the same time guarantee the effectiveness of supervision and the necessary central control.

The positions taken by the statutory regulations of the socialist States are in agreement in a sense that the Act violating a legal rule[64] can be invalidated only by the superior representative organ of state power. A suspension of the injurious Act may also be decreed by the superior administrative organ of general competence till the next session of the superior organ of state power.[65] There is no agreement between the Hungarian statutory regulation and the regulation of the majority of the socialist countries whether invalidation should be decreed by way of annulment or by a reformatory process. The latter are in favour of annulment, whereas according to clause (3) Sec. 8 of Act X of 1954 the council of superior order may annul or amend the Act violating a legal rule. Here there is a case of a reformatory process. Undoubtedly in its original formulation the purpose of the Hungarian solution was to establish as effective a form of the reinforcement of legality at the council as was possible. This was particularly the case with communal councils where there were few persons versed in the correct and accurate formulation of a norm, so that the reformatory competence of the district council operated towards a reinforcement of legality. However, in recent years it has become evident that the reformatory process was not sufficiently educative. An error of frequent occurrence is that the councils of superior order change the legal Acts of the councils of lower order, in particular the decrees of council, to an extent that the latter organs cannot anymore consider the critical provisions their own. Although the council of lower order mechanically takes note of the amended

[64] Here we have in mind the conflicts referred to above.

[65] Cf. paragraph (f) clause (2) Sec. 4 and clause (3) Sec. 8 of the Hungarian Act X of 1954; clause (3) Sec. 5 of the law of January 17, 1957 of the German Democratic Republic; Sec. 5, Article 65 of the Polish Act No. 16 of 1958 and Article 66 of the same Act; Sec. 73 of the Czechoslovak Act No. 69 of 1967.

provisions, still, in this way, it will not be compelled to analyze its own Act for the points in it derogatory to the law.

Although in conformity with effective Hungarian statutory settlement of the problem, both annulment and amendment have equal chances, still, there would be need for a reform of the practice followed by councils, when in general preference should be given to the system of annulment. There is no doubt that the annulment of norms infringing the law and the obligation of the councils of lower order to pass a new norm cannot have the desired effect unless the council of superior order in its resolution throws light on the reasons of annulment and on the proper solution. Subsequent legislation will have to narrow down the reformatory competence gradually—except the right granted in paragraph (f) clause (2) Sec. 4 of the Second Council Act (1954) to the Presidential Council of the People's Republic; the maintenance of this provision is justified because of its being associated with the general right of supervision and its character of a guarantee—and essentially change over to annulment.

In connexion with the legal Acts of the representative organs of state power problems emerge in large numbers; as to their solution, Hungary is still in the beginning. It is suggested therefore that in the future the discipline of constitutional law should apply yet greater attention to this scientific problem. This is at the same time closely related to the extension of the competence of the representative organs of state power, which in turn evokes the problem of the development of socialist democratism.

CHAPTER FIVE

THE OWN AGENCIES OPERATING WITHIN THE FRAMEWORK OF THE REPRESENTATIVE ORGANS OF STATE POWER

1. NOTION AND SYSTEM OF OWN AGENCIES

As has been explained earlier the priority or primacy of the representative organs of state power is a characteristic feature of the socialist State. From this priority it follows in the first place that in this political organism each organ or agency is directly or indirectly subordinate to the representative organs of state power, more exactly, to one of these. The subordination is manifest from the fact that the representative organs of state power have a direct or indirect role in the creation of the administrative organs, the judiciary and the procurator's offices (direct role in the election of the government and the executive committees, the supreme court, the country and district courts, and the procurator general; all other organs of public administration and of the procurator's machinery are as a rule appointed by the organs called to life by election). Parallel with their dependency, the organs so elected have an independent competence, delimited by statute, or at least functions of their own.

While occupying the described primary position in the political hierarchy, the representative organs of state power call to life the particular organs of state sovereignty, public administration, the judiciary and procurator's machinery, they establish some of them in a way that these are tied by permanent personal ties to the organ of state power, i.e. that their membership is composed of elected representatives, or council members. These organs may have a competence of their own, e.g. the Presidential Council of the People's Republic (the presidiums), or the executive committees and the organs of public administration of general competence, or may act as the subsidiary organs of the representative organs of state power (i.e. in general void of a competence of their own), i.e. the

presidiums, the presidents (chairmen), committees, groups within these organs.[1]

If therefore the political organs have to be classified on the ground of their relations to the representative organs of state power, then as a first result we shall find that there are agencies directly elected by these organs, and others in the creation of which they have an indirect role only. The former group may again be split up into two groups, viz. into such that are elected by the representative organs of state power from their midst, i.e. such that consist of representatives or council members, and such that are elected from among other persons. (In some of the socialist countries the former group is completed with non-delegates.) Finally when classification is continued by narrowing down the criteria yet further, we shall find among the organs elected from among delegates such that have a competence of their own, and such of a subsidiary character, i.e. such that have no competence of their own, or if so, an extremely restricted one. The latter assist the representative organs of state power in the performance of their function and the discharge of the duties within their competence. The system as outlined here is essentially uniform in all socialist countries, there being differences in details of minor importance only. On the whole the system conforms to that defined by the Soviet Constitution of 1936.

Is there a uniform pattern at all as regards the own agencies of the supreme and local representative organs of state power? Although since the introduction of the Soviet Constitution of 1936, and in particular in the wake of the 20th Congress of the Communist Party, a uniform type of the organs of state power and of public administration has taken shape in all socialist countries, no uniform pattern has come to life as regards the supreme and local organs in either the Soviet Union or other popular democracies. Here only the difference should be mentioned which may be demonstrated between the bifurcation recognizable in the top-level organization (presidium and government) and the uniform form of executive committees in the local organizations. There is a difference as regards the needs of the two types of organs between the relatively large number of officers

[1] In certain socialist countries, as regards competence, different traits are recognizable for the latter type of organs. However, these will be dealt with only upon detailed discussion.

active in the top-level representative organs of state power and the smaller collective organizations (committees, groups) widely employed by the former, on the one part, and the relatively narrower own organs of local agencies. This is contrasted by the fact that the mass relations or mass bases of the local agencies are far more extensive than those of the supreme organs. Consequently the low staff numbers of the own organs is counterbalanced at the local representative organs by the co-operation of the wide sphere of activists. Exactly because it is the primary activity of the supreme organ of state power to manifest the will of the working people, it must render itself capable for the performance of this role. It is the principal duty of almost all organs to promote legislative activities, and its committees and groups are organized for the preparation of this manifestation of will.

Considerations of convenience are responsible for the disagreement between the patterns of the operation and machinery of the supreme representative organs and those of the local organs of state power. The general internal organization of the supreme representative organs of state power consists of the following: the Presidium or Presidential Council, etc. having a substitutive and at the same time independent competence (the German and Rumanian state councils depart from this construction slightly),[2] the president of the supreme organ of state power, its other officers, clerks (the internal presidium), the committees, the council of seniors, groups of representatives. At the local representative organs of state power there is no special agency vested with substitutive and at the same time independent competence. In principle the executive committees formed of council members have no substitutive competence, in particular in conformity with legislation introduced during recent years (although the amended Section 88 of the Rumanian Constitution has taken a different position). The executive committees are agencies of public administration of general competence. Here the own internal machinery of the representative organ of state power is forming from a narrower organism, viz. the chairmen of the council (possibly its clerk or secretary) and the committees of the council.

[2] Cf. Articles 66 and 67 of the Constitution of 1968 of the German Democratic Republic, and Sections from 65 to 67 of the Constitution of the Rumanian Socialist Republic.

Naturally under a fundamentally different pattern, like that of the Yugoslav *skupshtina*, there will be a radical change also in the formation of the own organs. This is valid in particular for committees existing parallel with the *skupshtina* councils, having other functions.

2. INTERNAL PRESIDIUMS, PRESIDENTS (CHAIRMEN), OFFICERS OF THE SUPREME REPRESENTATIVE ORGANS OF STATE POWER

In each socialist country there are internal presidiums, or special institutions corresponding to these operating within the framework of the supreme representative organs of state power, together with committees or groups. Under different designations and with different competences, these are the subsidiary agencies of the supreme organ of state power. Here in the first place the presidiums, presidents and other officers will be dealt with. The construction of this institution, mainly in statutory regulation during recent years, differs appreciably by countries.

The presidiums and presidents of the supreme representative organs of state power are elected merely with a view to have an appropriate institution available for the organization and guidance of the activities of the organ in question.—Under the Soviet Constitutions it is the president, or his deputy, who presides over the the meetings of the Supreme Soviet (or in the case of the Soviet Union, the corresponding chamber) and represents the Supreme Soviet or its chamber to the outer world.—In conformity with clause (1) Sec. 9 of the standing orders of the Hungarian National Assembly (Resolution No. 2 of 1956) the chairman (speaker) "watches over the dignity of the House, takes care of the correct application of the standing orders, organizes the work of the Parliament and co-ordinates the activities of the committees". From this enumeration it is clear that, except for the representation of the National Assembly on official and solemn occasions, the functions of the chairman (speaker) are associated with the internal activities of the National Assembly. The situation is very much the same with the secretaries and clerks of the supreme representative organ of state power (who in conformity with Sec. 11 of the standing orders of the National Assembly "assist the chairman (speaker) in conducting the debates", they "read out the papers of

the National Assembly, count the votes and edit the minutes summing up the meeting") etc.

Both by designation and organization the organs discharging these functions differ in the various socialist countries. In the first place we shall deal with their names and character. In the Soviet Union, both the All-Union and the union or autonomous republics, there is no collegiate organ at this institution. In the Federal Soviet and the Soviet of Nationalities, further in the supreme soviets of the union and autonomous republics, the president and the number of deputy presidents are defined by the Constitution.[3]

A similar system has been adopted by Sections from 9 to 11 of the standing orders of Hungarian Parliament. These speak of particular officers, viz. the chairman (speaker), his two deputies, and six clerks (clause (3) Sec. 12 of the Constitution). Neither the Constitution nor the standing orders recognize the notion of a collective presidium.—The Constitution of July, 6, 1960 of the People's Republic of Mongolia mentions the president of the Great People's *Hural* and his four deputies.—A system very much the same has been established by the Federal Constitution of Yugoslavia where in conformity with Section 193 the Federal *skupshtina* elects a president and a deputy, or more. Also the councils of the *skupshtina* elect presidents.—On the other hand in the majority of the European people's democracies collegiate organs are elected for the discharge of the above functions. So according to Sec. 20 of the Bulgarian Constitution a bureau of a president and three deputy presidents is elected.—The same system has been adopted by the Rumanian Constitution (Section 50). Here the bureau is formed of the president of the Great National Assembly and his four deputies.—Under Article 18 of the standing orders of the Polish Seym (Seym decree No. 143 of March 1, 1957), the Seym is a corporate organization, its presidium is formed of the Marshal of the Seym and two deputy marshals. The presidium operates as

[3] In the All-Union Soviet, the Soviet of Nationalities, in the supreme soviets of the Ukranian, Byelorussian, Azerbaidzhan, Lithuanian, Moldavian union republics, further in the supreme soviets of the Buryatian and Tartar autonomous soviet republics each four, in the supreme soviet of the Russian Federation eight, in the supreme soviets of the Kazakh and Armenian union republics each three, in the soviets of all other union and autonomous republics each two deputy presidents are elected.

a corporate body (Article 1). From Article 26 of standing orders it appears that the ten secretaries of the Seym are not members of presidium.—In Czechoslovakia Sections from 20 to 23 of Statute 107, i.e. standing orders of the National Assembly entrusts these functions to the presidium and president of the National Assembly. The Presidium of the National Assembly has thirty members and is formed of its president, the deputy presidents, the presidents of the permanent committees and members. The attestors referred to in Sec. 24 of the standing orders are not members of the presidium.[4]—Article 55 of the constitution of the German Democratic Republic speaks of the presidium, which consists of the president, his deputy and the members.—Similarly a presidium is elected by the National Assembly of the Democratic Republic of Vietnam for conducting the sessions (Sec. 47 of the Constitution).

It may be mentioned that in the statutory meeting, before the election of the president, officers, presidiums, provisional officers discharge their functions. These officers cannot be elected, as at this moment the representative organ is still incapable of transacting business. Although officially it has taken up operations, still the mandates committees have not yet completed their function. For this reason another solution has to be resorted to. The standing orders of legislatures of most of the socialist countries, in conformity with the practice established in the bourgeois legislatures, adopt the institution of a 'chairman by seniority' and elect the youngest members clerks of the House. In Hungary Sections 3 and 4 of standing orders of the National Assembly recognizes a dual system. The statutory meeting of the National Assembly is opened by the President of the Presidential Council of the People's Republic. Until the mandates committees have completed their business the chairman by seniority presides over the sittings, assisted by the two junior clerks (their business is to scrutinize the mandates of the members of the mandates committees).—The same system has been adopted by the standing orders of the Bulgarian legislature (Section 1 of the standing orders of November 4, 1958).—The president acting after the convention of the newly elected Albanian Popular Assembly is chosen from among

[4] Owing to its peculiar character the questions relating to the presidium of the Czechoslovak National Assembly will be reverted to later on.

the ten oldest members (Article 4 of the standing orders of June 21, 1958). This is a by no means fortunate expedient, as the mandates of the delegates of the Assembly are still unconfirmed.—The president by seniority of the Polish Seym is selected from among the oldest members by the decree of the State Council (Article 16 of the standing orders of March 1, 1957). The president by seniority takes the solemn vows of the members and conducts the election of the president of the Seym.

The Czechoslovak procedure departs in all respects from that of seniority, as well as from all other forms of presidency, etc. As a matter of fact the presidium performs its function in the National Assembly until the newly elected Assembly appoints its presidium (clause (2) Article 59 of the constitution and clause (2) Sec. 20 of the standing orders of July 12, 1960).

In comparison with the functions of the presidiums, presidents, etc. those of the president by seniority and the junior clerks are limited in both time and extent. Their office expires in the first sitting, and is taken over by the permanent agency, i.e. the presidium, the officers of the House, etc. This short office term is restricted to transacting business in the first meeting, conducting the elections, and the functions of the mandates committees. Naturally the operations of the final and permanent organs extend to a considerably wider scope. The standing orders of the particular countries depart from one another in negligible details only. It is perhaps the standing orders of the Hungarian National Assembly which enumerate even the minutest details of the functions of the organs of the House.

The rights of the chairman (speaker) are defined, in general and in detail, by Sec. 9 of the standing orders. Accordingly, as said above, the chairman watches over the honour and dignity of the House, takes care of the correct application of the provisions of the standing orders, organizes the business of the House, co-ordinates the activities of the committees (clause 1), conducts the meetings of the House, is in charge of the maintenance of order in the premises of the House, represents the House on official and solemn occasions, defines the organization of the bureau of the House and supervises its work. At other places the standing orders describe the functions of the chairman in yet greater detail: it is the chairman of the House who in the first meeting informs the members of bills tabled, motions,

questions, and other matters proposed for debate, and it is at his motion that Parliament defines the agenda of session (clauses (1) and (2) Sec. 22). Motions in writing have to be submitted to him (clause (1) Sec. 23). He announces what motions have been made and proposes their being put on the agenda, or dismissed. He transfers motions to be discussed to the competent committee and may even shorten the statutory term of eight days for their discussion, when proper reasons are given (clauses (1) and (2) Sec. 24). Requests for leave to speak have to be forwarded to him before debate. He determines the order of the contributions to the debate, gives permit for addressing the House while the debate is on, or for repeatedly taking part in it (clauses (1) and (2) Sec. 33). In extraordinary cases he grants a permit to address the House (clause (2) Sec. 34). He calls to order members behaving in an undignified manner, or silences them. He may propose to exclude members from sitting (Sec. 35), move closure of the debate (Sec. 36), and in the event of an equality of votes (tie) cast the decisive vote (clause (3) Sec. 38). (This provision imposes limitations on rights of the chairman as member.) The chairman and the clerks on duty sign the minutes (clause (1) Sec. 40), the chairman takes care of drawing up the verbatim minutes (clause (1) Sec. 41), on application he may order the correction of minutes, of which he informs the House in next sitting (clause (4) Sec. 41). He moves holding of a secret session (clause (2) Sec. 43), together with clerks on duty he signs and takes care of the promulgation of resolutions of the House (Sec. 45). Questions and a short statement of facts concerning them have to be submitted to the chairman 24 hours before the sitting (clause (2) Sec. 46); the chairman announces questions submitted to him at the beginning of each sitting (clause (1) Sec. 47); when the minister to whom the question is addressed does not give an answer during the session, then such answer has to be forwarded to both the House and the questioning member in writing within 30 days (clause (3) Sec. 48). The chairman remits petitions for suspension of immunity, notices of the violation of immunity and of incompatibility to the committee of immunity and incompatibility, and makes a statement on such suspension and notice to next meeting of the House (clause (1) Sec. 51). The administrative organ of the National Assembly, the bureau, transacts its business on dispositions received from the chairman of the National Assembly (clause (1) Sec. 52).

Hungarian statutory provisions in fact reserve the term bureau to denote an administrative organ, unlike Bulgarian, Rumanian, and Albanian provisions, which uses the term to designate the presidium itself.[5]

Of the work of the clerks the standing orders declare that this consists in assisting the chairman, reading out of documents of the National Assembly in the sittings. The clerks act as tellers at divisions, they are also the drafters of the summarizing minutes of the session. The clerks on duty put their signatures together with that of the chairman to the minutes and published resolutions of the House (clause (1) Sec. 40 and Sec. 45).

Article 19 of the standing orders of the Polish Seym defines the rights of the presidium of the Seym. Accordingly the presidium watches over the privileges of Seym. It takes care of the proper transaction of business, the keeping of the terms, it represents the Seym, supervises the proper observance of the standing orders, takes action for the maintenance of order and peace in the premises of the Seym and explains the standing orders. Other rights of the presidium of the Seym: it issues decrees which, in conformity with the principles defined by the standing orders, regulate the procedure of the Seym in detail (Article 20); it handles affairs arising from relations to other legislatures (Article 21); defines the fees of experts participating in the business of Seym committees (clause (3) Article 34); determines the date of the sittings of the Seym, draws up the agenda and informs of it the members, the State Council and the Government (Article 42); moves the convening of secret sessions (clause (4) Article 43); refers the bills to the committees (Article 53); it may decline the acceptance of questions for formal reasons (clause (2) Article 71); it may appoint a day for hearing questions (Article 75); it may propose changes in the standing orders (clause (1) Article 76). The standing orders define the function of the Marshal of the Seym also in detail and separately from other provisions: the Marshal of the Seym presides over the sittings of the Seym, the presidium of the Seym and the Senate (clause (1) Article 22 and Article 57), he may decree a secret

[5] The bureau of the legislature keeps the records relating to the representatives and the committees, engages the sufficient number of stenographers, extends its organizational and technical assistance to the committees and representatives (clause (2) Sec. 52).

session to be held (clause (4) Article 43), he signs the minutes together with the clerk on duty, and may decree the cancellation of certain terms in the minutes (Article 45). The Marshal of the Seym calls up the members or silences them (Article 62), calls to order members disturbing the debate (Article 63), decrees a division (Article 64), decides the order of the division (clause 2 Article 67), forwards legislation passed by the Seym to the president of the State Council (Article 69), informs the Seym of questions forwarded to him (Article 72).

The clerks of the Seym draw up the list of the members desirous to address the Seym, act as tellers at divisions, and discharge functions entrusted to them by the president of the Seym (Article 26).[6]

The Albanian standing orders have little to say of the bureau and its members. The president conducts the sittings, takes care of the observance of the standing orders, and the maintenance of order in the sittings (Article 12), on his motion the Popular Assembly meets for a secret session (Article 30), and he informs the Assembly of questions submitted to him (Article 50). The deputy presidents assist the president in the transaction of business of the House, the clerk takes care of the drawing up of the minutes, the popularization of the resolutions of the Assembly, the order of the division and the ascertainment of the results of the division (Article 12).

Finally let us have a survey of the functions of the presidium, president, attestors of the Czechoslovak National Assembly. The functions of the presidium of the National Assembly within this scope are briefly the following: the presidium decides on the agenda of the organs of the National Assembly, it controls the foreign relations of the National Assembly, scrutinizes the bills for their appropriateness, refers drafts to the committees, gives a binding interpretation to the standing orders, appoints the date of the sittings of the National Assembly, draws up the agenda, appoints the attestors, assists the members in the discharge of their functions in the constituencies, decides on the organization of the bureau of the National Assembly, on the delegation of members to committee meetings, if such members are not committee members at the same time, decides on requests

[6] The German standing orders define the rights of the presiding member of the presidium, who may be anyone of the members asked to take the chair (Sec. 6).

of the members for leave (clauses (2)–(7), (10)–(12) and (14)–(15) Sec. 22). Under Sec. 23 rights of the president are as follows: he conducts sittings of the National Assembly and of the presidium of the National Assembly and conferences of members, he represents the National Assembly, signs the statutes and the law decrees of the presidium of the National Assembly, and reports to the National Assembly on the activities of the presidium. The attestors, who are not members of the presidium, attest the resolutions and minutes of the National Assembly and assist at the ascertainment of the results of divisions (Sec. 24).

Although these functions and scopes of activities differ from one another, still they agree in a single respect, viz. in their limitations. As a matter of fact there is not a single one among them which would go beyond the organization of the activities of the supreme representative organ of state power, or assisting it in its operations within the House (perhaps the Czechoslovak standing orders exceed these powers slightly, mainly owing to the particular character of the position of the presidium). The operation and activities of the presidiums, presidents and other officers attach to the activities of the supreme representative organ of state power as a legislative and deliberating organ. During recent years the situation has changed insofar as particular presidiums, similarly to the Czechoslovak, begin to deal with the work of the members in their respective constituencies, in particular with that of groups of members. So in Hungary, the bureau of the National Assembly under the guidance of the chairman has undertaken the attendance to constituency problems. So far this power of the presidium and the bureau has not been laid down in a statute.

The fact that certain standing orders speak of the right of the presidium or president to make decisions (clause (4) Sec. 20 and Article 20 of Polish standing orders) is of minor importance. This right has come to the fore partly in the course of the preparatory activities of the collective, partly because certain standing orders entrust the presidium with the authoritative explanation of the standing orders, when making decisions is inevitable (e.g. clause (6) Sec. 22 of the Czechoslovak and clause (2), Article 19 of the Polish standing orders). The Polish standing orders authorize the presidium of the Seym with its decrees to bring under regulation the procedure of the Seym within

the limitations of the standing orders. This expedient is unknown in other socialist States. It is not even wholly justified and the question may be asked why does the supreme representative organ of state power not settle details of its procedure. In fact the Seym meets rather frequently.

It is characteristic of the position of the presidiums that in conformity with the standing orders their functions are overwhelmingly of an advisory nature. Almost all standing orders decree that the presidium or president shall draw up the agenda of the sittings or sessions. The supreme representative organ may carry through changes in the agenda at option. The same applies also to other sets of problems. Hence the presidium, etc. depends on the supreme organ of state power which creats it, and its Acts, even in the internal organizational-technical sphere. This is quite understandable, since the statutes or standing orders (except for the presidium of the Czechoslovak National Assembly enjoying a wholly special position) do not confer an autonomous competence on these organs. There remain therefore the subsidiary functions to the supreme representative organs of state power, i.e. functions which are actually dependent on the principal tasks of these organs, i.e. the creation of legislative acts arising from popular sovereignty. Whenever the presidium or a similar organ comes into conflict with this competence of state power, the act and will of the supreme organ of state power puts its stamp on this activity. To define this is the more important, because in this case we are dealing with the permanent collective or individual organ of the representative organ of state power which, notwithstanding its significance, has no independent competence.

This will become particularly clear when these organs (for the sake of brevity called internal presidiums) are compared with those substituting the supreme organ of state power in the various socialist countries. In the Soviet Union, the union republics, Albania, Bulgaria, Mongolia, in the Czechoslovak Socialist Republic, in the People's Democratic Republic of Korea these organs are called respectively the presidium of the Supreme Soviet, the Great Popular Assembly, the National Assembly, the Great People's *Hural*, the Supreme National Assembly; in Vietnam this is the permanent committee of the National Assembly, in three socialist countries, viz. the People's Republic of Poland, the German Democratic Republic, and the Peo-

ple's Republic of Rumania (in the latter two by virtue of subsequent legislation)[7] the organ is called State Council, and in Hungary the Presidential Council of the People's Republic. The widest-spread designation, i.e. presidium, has been current since 1936. Those not versed in socialist constitutional law often are under the impression that these presidiums are the internal presidencies of the supreme representative organs of state power, which perform technical and organizational functions only. Although, in countries where the presidium has the right to substitute state power certain technical-organizational organs of other designations have been created (in Albania and Bulgaria the bureau as opposed to the presidium; in Mongolia the president of the Great People's *Hural*, similarly, as opposed to the presidium, etc.), it is not by mere chance that during recent years the easier distinguishable designation 'state council' has been adopted. So also the name clearly distinguishes this supreme representative organ of state power from the presidium, bureau, or president performing technical functions only.

However, it should be remembered that there is no complete harmony in the socialist discipline of constitutional law as regards this question. When the new Czechoslovak Constitution was still in the drafting stage, the principle prevailed that faithfully to its designation the substitutive competence of the National Assembly and the internal competence of the presidium had to be concentrated in the hands of the presidium of the National Assembly. ". . .The Presidium of the National Assembly performs two principal functions: on the one part it organizes, co-ordinates, and ensures the operations of the National Assembly and its committees (clause (1) Sec. 60), and on the other, during the period when the National Assembly is not sitting,

[7] In the German Democratic Republic the amendment of the Constitution of September 12, 1960; in Rumania the amendment of the Constitution of March 21, 1961. Essentially both amendments have created an organ operating on the principle of collective leadership. This has not created a new situation in Rumania, where also the presidents of the Great National Assembly and of the Council of Ministers were eligible to the State Council. Nor did the wording of the German Constitution prohibit the election of the Council of Ministers and the members of this council to the State Council. The eligibility of these persons to the State Council has not been touched by either the Rumanian Constitution of 1965 or the German Constitution of 1968.

it exercises the functions of the latter", writes Levít.[8] To this he adds its functions of substituting the president of the Republic extends to the brief period between the election and the installation of the new president, further to periods when for grave reasons the president is prevented from performing his duty. So the presidium of the National Assembly performs three functions, of which only one is a presidential function. Duties implied in this function have been enumerated earlier. This exception has to be taken notice of,[9] the more because it follows logically from the structure of the Czechoslovak Constitution. As a matter of fact in our opinion the two functions ought to be segregated altogether, and in this case their name would have to be changed accordingly; or else the two organs should be merged into a single one in both designation and functions. The Hungarian method is logical insofar as in the designation of the substitutive organ there is no reference to the National Assembly. Consequently its designation does not suggest some sort of an internal presidency or bureau. On the other hand it is for this reason that the dependence of the substitutive organ on the Parliament and its relation to the supreme representative organ do not find expression. Therefore in the circumstances the Czechoslovak solution appears to be the more justified, as the combination of the two functions reminds the presidium of the National Assembly of its obligations to the supreme organ of state power. This pattern of competence for that matter refers back to Chapter VII of the Soviet Russian Constitution of 1918, where functions of co-ordination and also others were vested in the Central Executive Committee in respect of the All-Russian Congress of the Soviets.

The activities of the presidiums, bureaus, etc. guarantee the organized character of the operations of the supreme representative organ and their legality, and prevents them from becoming disorganized. It is here where their significance lies in the first place.

[8] Pavel Levít, Les organes suprêmes de l'état dans la nouvelle Constitution. *Bulletin de droit tchécoslovaque, Prague 1960*, Nos 1–2, p. 77.

[9] In this respect Antal Ádám is wrong in footnote (2) of his paper A szocialista országok prezidiumai (The presidiums of the socialist countries), *Állam és Igazgatás 1961*, No. 6, p. 457.

3. COMMITTEES OF THE SUPREME REPRESENTATIVE ORGANS OF STATE POWER

The mass character and collective activities at all stages are the characteristic traits of the socialist representative organs of state power. When this statement is made we cannot merely confine ourselves to declaring that these organs pass all their important resolutions collectively. In addition, it is essential that the said organs build up a wide mass support. Both at the summit and locally the organs of state power can display their normal, everyday activities in the proper manner only when they build up an extensive network of activists, or create organizational forms suitable for the initiation of activists. During recent years for both the promotion of the collective activities of the councils (soviets) and their agencies and the initiation of the masses into governmental work the theoretical and practical problems of the committee system have been analyzed in the socialist States with great thoroughness. The committees, which operate in subordination to both the supreme organs and the local councils, have become extremely important means in the development of socialist democracy.

This is the reason why works dealing with the committees are in greater abundance in the socialist discipline of constitutional law than those discussing the presidiums. It is even more striking how large in number are in the new socialist constitutions and the standing orders of the supreme representative organs of state power the provisions bringing under regulation the legal order of the committees, as compared to the earlier situation. The number of committees has grown and the sphere of their functions has been extended.

Before proceeding to a detailed discussion of the committees a general description should be offered. Novikov in a short study speaking of the permanent committees of the Supreme Soviet of the USSR merely states that these are subsidiary organs[10] serving the ends of the gradual expansion of democratization.[11] J. Beér considers the parliamentary committees informative, supervisory and prepara-

[10] S. G. Novikov, *Постоянные комиссии Верховного Совета СССР* (The permanent committees of the supreme soviet of the USSR), Moscow 1958, p. 7.
[11] *Ibid.*, p. 48.

tory organs, whose function is among others to guarantee the continuity of the operations of Parliament.[12] Since committee work has grown extensively mostly in the People's Republic of Poland it is but proper to study the general functions of the committees on the ground of experience accumulated in Poland. Rozmaryn makes mention of the committees of the Seym in two respects, viz. as the preparatory organs of legislation and as the fact-finding, supervisory organs of the Seym.[13] Hence it cannot be argued that at this stage the committees are corporate organs subordinate to the supreme representative organ of state power, without autonomous competence, which in a subsidiary capacity, perform preparatory legislative, fact-finding and supervisory functions. This is the unanimous position taken in the literature.

On the whole this definition holds for the committees of the supreme organs of all socialist States. The various legal Acts define their functions also in their details. These definitions will have to be analyzed on the ground of the effective legal regulations.

The Constitution of the Soviet Union does not include traits of any importance in this respect. As a matter of fact a quarter of a century ago no particular stress was laid on the question. The mandates committee, as the organ making motions, and the committees of revision are referred to in Sections 50 and 51. Similar provisions have been taken up in the constitutions of the union republics.—As will be shown subsequently, practice has extended the scope of activities of the committees beyond the original limits. Already the two standing orders of February 25, 1947 on the legislative committees of the two houses of the Supreme Soviet entrust the following functions to these committees: supervision of the bills of other committees, drafting its own motions, checking of ministerial documents, summoning the representatives of the government, ministries, chief authorities to render account, and consultation on governmental affairs with the representatives of the political, scientific and social organs (Clauses 3, 5, 6, 7 of the standing orders).

[12] János Beér, A népképviseleti rendszer fejlődésének iránya a szocialista államban (Trends in the evolution of the system of popular representation in the socialist State), *Magyar Tudomány* 1959, No. 10, p. 517.

[13] Stefan Rozmaryn, *Sejm und Volksräte un der Volksrepublik Polen*, Warsaw 1961, pp. 33 and 54.

Clause (1) Sec. 17 of the Hungarian Constitution contents itself with stating that committees may be created for the study of a specific question. However, Sec. 12 of the standing orders describes the committees as consulting, advisory and supervisory organs. The permanent committees continually assist the Parliament in its creative (legislative), guiding, supervisory operation. The committees draft the bills and prepare the debate on bills and other motions (clauses (3) and (5) Sec. 15).

The provisions of the standing orders of the Polish Seym on committees are about as detailed as taciturnly they are dealt with in Article 21 of the Constitution. Article 29 specifies the functions of the committees as follows: scrutiny of the bills and decrees, commenting on the draft decrees of the State Council, hearing the reports and information submitted by the government departments, chief executives of other authorities and institutions, analysis of the operations of administrative and economic organs, drafting decrees (Article 38).

According to Sec. 52 of the Rumanian Constitution permanent and temporary committees are elected. The permanent committees draw up reports and expert's opinions of the bills (and upon request of the State Council also on the drafts of law-decrees); hear the reports of the presidents of public administration, procurator's offices and supreme court. The functions of the provisional committees are defined by the National Assembly. In conformity with Sec. 53 a constitutional committee has been called to life.

The Czechoslovak Constitution describes the committees as working and initiating organs which follow up the realization of the economic and cultural targets with attention and take the initiative in such matters (clauses (1) and (3) Sec. 53). In conformity with the standing orders the committees discuss the bills and draft law-decrees, problems arising in the field of public administration, put forward motions, institute investigations at the site, initiate legislation, demand information from the government, its members and other authorities (Sections 28, 31 and 32). In addition, the committees debating on bills supervise enforcement after the bill has been put on the statute book (Sec. 42).

The Bulgarian fundamental statute law in Sec. 28 emphasizes the privileges of the committees to institute supervision and investigation in any matter. The standing orders, mainly Section 12, make the debate

on bills, the supervision of the enforcement of statute laws the principal function of the committees.—The Albanian method does not depart from other socialist regulation appreciably. In Albania Sec. 52 of the Constitution entrust the committees with the institution of investigations and Sec. 14 of the standing orders make the revision of bills the function of the permanent committees.

Sections from 203 to 209, of the Yugoslav Federal Constitution creates a different system of committees. In Yugoslavia committees are active not only at a single chamber, but in all councils. The most important committees are those of the Federal Council, which are in charge of the discussion of a variety of problems, the study of motions and of the tabling of motions. (The committee of elections and appointments of the *skupshtina* occupies a special position. Its chairman and the majority of its members are appointed by the Federal Council and the other councils from among the members of the federal representatives. A definite number of members is delegated by the Socialist Federation). The *skupshtina* and its councils also elect provisional committees.

From this enumeration it is evident that most of the standing orders lay stress on the drafting of legislation. In the first place the standing orders introduced during recent years begin to deal with the supervisory and investigating rights of the committees, and the organization of discussions by them in the presence of experts. There is no doubt that the interest of these organs will be focused on the discussion of draft legislation even in the future. However, when it is intended that the committees should become acquainted with everyday governmental work, they will have to institute a growing number of investigations on the site, and analyze and discuss the activities of the governmental organs to yet greater depths. This is how the operations of the legislature can be made continuous and properly founded.[14] The com-

[14] The significance of the committees is borne out by the fact that e.g. the Bulgarian literature on constitutional law considers the increases of the number of the permanent committees and the improvement of their operations an essential item of the evolution of socialist democratism in legislative work (in addition the authors mention the greater frequency and duration of the sessions of the National Assembly and the direct participation of the people in legislation). Cf. B. Spasov, По въпроса за законодателната функция на Народното Събрание (To the question of the legislative functions of the National

mittees are in the position to put forward thoroughly prepared reports before the plenum of the representative organ of state power. This enlivens the work of the supreme governmental organ, and at the same time offers an opportunity for the engagement of a network of activists in governmental operations. The committees should in particular be leading in the mobilization of the scientific forces of the country in that they apply for the assistance of the different scientific institutions in their investigations in connexion with drafting work and bills.[15] The extension of the scope of activities of the committees is hardly conceivable otherwise. Hungarian statutory regulation has already referred to the new traits in the work of the Parliament committees and since the promulgation of the standing orders a certain enlivening may be noticed in the activities of the committees, in the first place in those of the permanent committees. There was only a moderate response, not only in Hungarian but also in other popular democracies, to the provisions of the standing orders on the formation of provisional committees, though—as experience shows—where provisional committees were called to life in large numbers, like in Poland,[16] these also contributed appreciably to the activities of the supreme representative organ of state power.

In connexion with the discussion of problems associated with the scope of activities of the committees mention has to be made of the fact that committees have no independent competence and that they cannot assume the competence of the supreme organ of state power having called them to life. In none of the socialist countries can the supreme representative organ of state power delegate autonomous competencies to the committees under the present constitutional provisions.[17] Consequently the scope of functions of the committees has to be defined with due regard to these limitations.

The scope of functions of the committees is defined by the sectors (departments) and it depends on the number of competences

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Assembly), in P. Staynov, L. Vasilev, A. S. Angelov and B. Spasov, *Правни проблеми на конституцията на Н. Р. България* (Legal problems of the Constitution of the Bulgarian People's Republic), Sofia 1958, pp. 196–200.

[15] Cf. the provisions of clause III/3 of the Resolution No. 1 of 1956 of the Hungarian National Assembly.

[16] Cf. Stefan Rozmaryn, *Op. cit.*, p. 22

[17] Here the comments of János Beér may be agreed with (*Op. cit.*, p. 517).

for which committees have been created by standing orders. During recent years committee work has spread also in this respect. Further differentiation has taken place in committee life. Although statutory regulation differs widely in the various socialist countries, nevertheless general traits of interest may be established from these rules.

In the Soviet Union there are remarkable differences between the All-Union committees of the supreme representative organs of state power and those of the union republics. In the two chambers of the USSR Supreme Soviet a relatively small number of committees exists. However, in certain union republics the number of committees is fairly high. While the committees of the All-Union chambers are mostly of a functional type, in the union republic mostly departmental committees have been formed. In the Russian Federation there are trade and transport, agricultural, educational and cultural, public health and social committees, in the Ukranian union republic there are in addition commercial and supply committees, in Georgia home building, communal and town-planning committees. In the course of development departmental committees may be differentiated yet further

Most of the committees of the National Assembly of the Hungarian People's Republic are departmental. In conformity with clause (1) Sec. 15 of the standing orders, the following committees have been organized: legal, administrative and judicial, foreign affairs, national defence, plan and budget, agriculture, industry, commerce, cultural, social and public health (of these the plan and budget committee is of a functional character). There is an obvious tendency to organize the committees on the pattern of the actual principal divisions of state administration. In addition to these permanent committees there are the mandates committee (Sec. 5), and the committee of immunity and incompatibility (Sec. 16). It is due to the nature of the provisional committees that the standing orders do not enumerate them.

Of all people's democracies Poland has the widest-spread network of committees. In the Seym (Article 28) together with the mandates committee, the number of permanent committees is nineteen (building and communal development; maritime and navigation; home trade; foreign trade; transport and telecommunications; culture and art; forestry and timber industry; mandates; national defence; educational and scientific; economic planning, budgetary and financial; labour and public welfare; heavy chemical industry and mining; light and

small-scale industry and co-operatives; agricultural and food industrial; home affairs; foreign affairs; justice; public health, physical training). It is characteristic of the Seym committees that notwithstanding their overwhelmingly departmental character they have not been assimilated to the departments of state administration, but they have preserved a complex nature. Committees have been called to life in fair numbers for the co-ordination of mutually supplementary branches of agriculture and industry, however, complexity appears also in other scopes (e.g. labour and welfare; public health and physical training, etc.). The experiment appears to be rather attractive, and it cannot be doubted that it opens vistas for a comprehensive survey by the supreme representative organ of state power of problems such as raw-material production and processing, the repercussions of certain regulations in other scopes, etc.

The least differentiated are the committees of the Popular Assembly of Albania, of the National Assembly of Bulgaria and of the National Assembly of Vietnam. In the first two instances the existence of five committees is known (economic and financial; legislative; foreign affairs; educational and cultural; public health, labour and social insurance in Bulgaria by virtue of Sec. 9 of the standing orders;[18] the legislative; budgetary and economic; foreign affairs; social; and cultural committees in Albania by virtue of Sec. 14 of the standing orders; and—in conformity with Sec. 57 of the constitution of Vietnam—the legislative and plan and fiscal committees as obligatory committees, whereas their National Assembly can call to life other permanent committees at option).

During recent years committees have been organized in larger numbers than before, in the first place in countries where new constitutions or standing orders have been introduced. The newly created committees are increasingly of the departmental type. This may be explained by a gradual withdrawal from the functional system. Also it should be remembered that inquiries and analyzes may be carried through in the most convenient manner in the departmental system. It is easier to find experts in a particular branch and even the represen-

[18] Also the number of Bulgarian committees has increased during recent years. In the legislative cycles I and II the National Assembly had three committees only (bills, budget, and foreign affairs). Cf. Boris Spasov, *Op. cit.*, p. 197.

tatives will find it more convenient to study their problems within departmental limits. Functional committees are needed only where the supreme representative organ of state power has to study the given problem in an all-departmental relation (e.g. the plan and the budget). Everywhere else the functional system is apt to introduce complexities (so also in the sphere of the labour question). On the other hand that of the Seym committees in Poland is a rather interesting and useful experiment. Here the committees in fact allow the survey of coherent scopes to the representatives and the Seym. Complex investigations may be tackled also with the provisional committees known in Hungary, still this method is of use only if the possibilities of their taking permanent forms are created.

Owing to their importance organization and procedure of the committees have been laid down in standing orders, i.e. legal provisions, in most of the socialist countries. As regards organization only a small number of questions deserve attention. So e.g. the demand that the representatives or delegates should take part in the work of the committee (and so in the continual operations of the supreme representative organ of state power) in as large numbers as possible has brought about that in the standing orders throughout a large number of members has been specified for the committees. In the committees of the chambers of the Supreme Soviet of the Soviet Union from 21 to 39 members are active, in the Rumanian committees from 15 to 29, in the Hungarian committees from 15 to 21 (the committee of immunity and incompatibility has only eleven members); in the Albanian committees uniformly 13 members are elected. Naturally the number of members is influenced by the number of committees and the number of members of the representative organ. Still it is striking that a large membership has been specified by the corresponding standing orders for the recently organized committees.

In each country the members of the committees are exclusively representatives or delegates. In the literature of constitutional law not even the idea has emerged to invite non-representatives as fully-qualified members on the committees, a question much discussed in respect of the committees of the local councils. There is full agreement in the literature that a network of activists should be organized at the supreme representative organ of state power, and that the committees could become the best organizers and centres of this network.

This statement does not affect the general principle that in association with the functions of the supreme representative organ of state power the representatives have special rights and obligations. It stands to reason that at least at the preparatory stage problems are often brought before the supreme organ of state power where it is unadvisable to disclose all data to the public. Owing to his position and rights, the representative has an opportunity to become acquainted with these problems within the statutory limits. In our opinion this right should be preserved for the representatives, the delegates of the working people, who—as a whole—represent popular sovereignty. In the committees these delegates in reality continue the work they do in the representative organ of state power. This feature of committee work has been clearly defined by Rozmaryn; he writes "... remission of a motion to a committee does not mean like in certain parliaments a procedural change in the work of the plenum ... the task is actually entrusted to the committee, a narrower Seym organ formed of a number of representatives ...".[19] Hence the activities of the committees are the continuation, supplementation, preparation of work performed, or to be performed in the supreme organ of state power. The committee members carry on their functions as representatives. Therefore it is essential that only representatives should be elected on the parliamentary committees. (Section 53 of the Rumanian Constitution departs from this principle by decreeing that at most one third of the constitutional committee may be non-representative experts.)

The committees have their officers. However, these have no special functions beyond guiding and administrative activities. In the Hungarian committees a chairman, deputy chairman, and a secretary, in the Polish committees a chairman and deputy chairmen, in the Czechoslovak committees a chairman and deputy chairman, in the Bulgarian committees a chairman, deputy chairman and secretary, in the Albanian committees a chairman and deputy chairman, in the German committees a chairman, deputy chairman and secretary transact the committee's business. In a few countries (Bulgaria, Albania, Czechoslovakia, the German Democratic Republic) the chairmen are elected by the supreme representative organ of state

[19] Stefan Rozmaryn, *Op. cit.*, p. 33.

power, in other countries he is elected together with the other officers by the committee. The first method has evidently as its objective to emphasize the responsibility of the chairman to the plenum of the organ of state power. (Since the chairman is anyhow responsible for the acts of the committee, this special emphasis on his responsibility is meaningless.)

An important section of the statutory regulation is the one dealing with the principles and methods of operation. Naturally, the statutes touch only on matters of major importance, while details are in general ignored. It should be mentioned that these regulations do not confine themselves only to the methods, they also include the rights of the committees. So e.g. the section of the Hungarian standing orders (50) throwing light on the relations between committees and the Council of Ministers, at the same time defines the right of the committee to request information from the relevant members of the government.

The Hungarian standing orders mention as the most important and foremost principle the one authorizing the committees to organize sub-committees and to invite experts to participate in their work. However, the sub-committees may be formed exclusively of the members of the committees, i.e. representatives (clauses (2) and (3) Sec. 49). Article 35 of the Polish standing orders departs from this provision insofar as for the sub-committees of the Seym they distinguish between permanent and provisional sub-committees. Among these the provisional sub-committees may have members who, though representatives, are not members of the permanent committee. As said above non-representatives may be invited only in the network of activists. Even there both the Hungarian and the Polish standing orders merely offer an opportunity to invite experts to the committee sittings (the Polish regulation even permits that the chairman of the committee avails himself 'in another way' of the co-operation of experts). At the same time in several standing orders there are references to the close ties the committees have to build up with social organizations and the workers (e.g. Sec. 29 of the Czechoslovak standing orders, and clause 2 Article 34 of the Polish standing orders).

In a number of standing orders (e.g. in Sec. 34 of the Czechoslovak and clause (4) Sec. 49 of the Hungarian standing orders) the statement is of importance that the committees are active even during a recess of the legislative. This statement could have been formulated in a more

positive form, as in fact its meaning is that the committees and sub-committees, with their preparatory, supervisory and analytical work, should fill the period when the plenum of the organ of state power is not in session. As a matter of fact in the socialist governmental machinery it is not the permanent operation of a 'voting machine' that is needed, but that the state organs, in particular the representative organs of state power, through a network of activists assisted by the population and its mass organizations, study the matters brought before them as thoroughly as possible, explore the relevant opinion of the workers, and then follow up how the statutory provisions once approved and put into operation are enforced by the political organs and the citizens, and finally how these provisions have stood the test in the field. To all this any increase in the number of sittings or sessions of the supreme representative organ of state power will of course not suffice. It is only the committees, sub-committees, activists that are capable of tackling these functions through their constant activities. For this reason new working methods have to be introduced, in particular in a way that the committees meet regularly, convene meetings with agenda laid down in an operating schedule, institute inquiries and study problems significant from the point of view of political and social life. Recent standing orders develop the operations of the committees in this direction.

It is a policy-making problem, yet attached to the question of working methods and associated with the mass relations of committee activities that most of the standing orders do not want to exclude from the work of the committees the delegates who are not members of the committee in question. So clause (3) Sec. 50 of the Hungarian standing orders declares that when bills and motions are discussed in the committee each representative is free to bring forward proposals. In this case the said representative may attend the committee meeting in an advisory capacity. A similar rule has been taken up in Sec. 28 of the Czechoslovak standing orders, which in general grant a right to non-member representatives to attend the committe meeting in an advisory capacity.—Clause 4, Article 34 of the Polish standing orders formulates this right in a somewhat negative form. Here the permit of the chairman of the committee is needed for attending committee meetings in a non-voting capacity. All three methods justify the conclusion that it is not intended to emphasize

the closed character of the committees too rigidly towards the other representatives and towards the organ of state power itself. The proper course is to lend the committee activities as great a publicity within the supreme representative organ as possible, and to make the results and experiences known within a wide sphere. Incidentally this is served by the reinforcement of the sub-committees with further representatives as decreed by clause 1 Article 35 of the Polish standing orders.

On the other hand it is a characteristic feature of the standing orders that the method of passing resolutions in the committees has been brought under regulation with precision in almost all countries. It cannot be argued that this form of passing resolutions in each case operates towards strengthening the sense of responsibility in each member of a given corporate body. This is necessary, for although a committee resolution is binding on no person other than the committee members, the resolution will nevertheless carry weight and be pregnant of consequences in the plenary session. Therefore the Hungarian standing orders declare that for a quorum the presence of at least one half of the members is needed (clause (5) Sec. 49). In the same way the quorum has been fixed by the Polish standing orders (clause (1), Article 36), the Czechoslovak (Sec. 35). Simple majority has been specified for a resolution by clause (1) Article 36 of the Polish standing orders, and Sec. 35 of the Czechoslovak standing orders.

A number of other problems in connexion with the working methods emerges in the standing orders. However, no questions of major importance are involved here. Most of them give an answer to special questions turning up in the one country or the other. No conclusions of moment may be drawn from the study of these problems.

Finally we shall have to deal with an organ which is unknown to Hungarian constitutional law, and which cannot even be enumerated among the committees of the supreme representative organ of state power. In a few socialist countries the institution has been revived on traditional grounds, or newly created. In its activities this institution resembles committees. It is the seniors' council. In the Soviet Union both chambers of the Supreme Soviet elect a seniors' council for the duration of the session. To this council the groups of representatives of the union republics, the frontier zones and regions delegate

members. The seniors' council is a subsidiary organ which cannot take over the rights of the chamber. It is authorized to table bills or to propose personal motions for debate.[20] As oldest tradition this body has survived in the Polish Seym. Here the seniors' council is formed of the president of the Seym and his deputies, further the presidents of the clubs of members and their deputies. The council may invite other members to its sittings. The sittings of the seniors' council is convened and presided over by the president of the Seym. Here the seniors' council is an advisory organ, assists the work of the Seym, and promotes the co-operation of the clubs and circles of the representatives. It considers motions on the date and agenda of the sittings, the election of the officers of the Seym, the ways of debating on certain items of the agenda and on other matters submitted by the presidium (Articles 23 and 24 of the standing orders). Incidentally the presidium of the Czechoslovak National Assembly is formed also on the pattern of the seniors' council, as among its thirty members in addition to the president of the National Assembly and his deputies, the chairmen of the permanent committees are also included. However, its functions differ from those of the seniors' council (Sec. 20 of the standing orders).

The fact remains that the system of committees at the side of the supreme representative organs of state power is of extreme moment and is still in the rudiments of growth. The evolution of socialist democratism insists in this sphere on an increase in the activities of the representatives in order that they might become active participants in legislation and supervision. Committee work lends itself most readily for the achievement of this object.

4. GROUPS AND CLUBS OF MEMBERS

As has been made clear earlier the general trend in the development of the representative organs of the socialist state power operates towards a many-sided exploitation of mass relations. In all socialist

[20] Ya. N. Umanski, *Советское государственное право* (Soviet constitutional law), Moscow 1959, p. 274.

countries the problem of the engagement, of the co-operation of delegates emerges most frequently in this connexion. As a matter of fact this would be a way of turning the representative institution into a working corporate body, which builds up ties to the population in a number of directions and by many ways. Since the needs and will of the local population is expressed with greatest clarity by the local representative organ of state power elected and continually influenced by it, a few years ago the problem of some sort of a contact emerged between the supreme representative organ of state power and its members on the one part and the local representative organs on the other. Meanwhile it was and has remained a constant problem how an organized co-operation could be called to life and maintained between the representatives and the mass and other organizations operating in the mechanism of the dictatorship of the proletariat as transmission agencies.

One of the organizational forms actually making headway in a growing number of socialist countries is the institution of groups of members, clubs and circles. Such organizations operate in Hungary, the Soviet Union, the German Democratic Republic, the Czechoslovak Socialist Republic, in the People's Republic of Poland, etc. In general two principal types have developed. The birth of the two types is closely associated with the circumstances whether or not there is a multi-party system in the given country. Where there are several parties, the groups are organized on a party basis. Where there are no parties the members are grouped by the distribution of the constituencies.

In Hungary groups of representatives have been formed by virtue of Clause IV/4 of the Resolution No. 1 of 1956 of the National Assembly. (The resolution is a generalization of the earlier practice of certain counties.) Accordingly the functions of the groups of members organized by counties (later county and metropolitan groups) are the expansion of activities of the representatives in their constituencies, the collection of local experiences, the co-ordination of operations in the constituencies, the intensification of co-operation with the population and the maintenance of continual connexions to the chairman of the National Assembly. A subsequent resolution of the Council of Ministers (1087/1956/IX. 4) instructed the president of the Central Statistical Office to assist the groups in their activities and to

place at their disposal the statistics needed for their work continually and regularly (II/1). The resolution also decreed that the official gazettes of the ministries and of the agencies of national competence should be forwarded to the groups (II/4).

Hence the groups of representatives are active in each constituency: in the capital and in the counties. Each representative is member of the group organized in the county where he was elected. The group elects officers, a chairman, his deputy and a secretary, in Budapest a chairman, secretary and five executive members.

The groups of representatives operate on a definite schedule and meet at intervals of six to eight weeks. The place of the meetings is the county seat, or another community of the county, an industrial plant, agricultural co-operative, institution, etc. in the county. In the meetings the members make preparations for the next session, and study the problems of the county in relation to the agenda of the next session. (The chairman of the National Assembly at intervals invites the chairmen of the groups to a conference and informs them of the agenda of the next parliamentary session.)

Another function of the groups is to establish relations to the local councils. Most of the groups establish closer contact to the councils operating in the territory of the county, in the first place to the county council and its agencies. The groups take interest in the particular fields of council work and extend their assistance when necessary. They discuss the operations of the various organs of the council.

Similarly as the Hungarian method, Sections 49 and 50 of the Czechoslovak standing orders have created district circles of the representatives of the National Assembly and the council of representatives embracing these circles.

Accordingly, the district circles include the representatives elected in each district, or in Prague those elected in the metropolitan area. The circles discuss the activities of the supreme organ of state power and of its agencies, and the activities of the representatives in their constituencies. Decisions made on these matters are forwarded to the National Assembly. The council of representatives is an auxiliary organ of the presidium of the National Assembly and operates only during the parliamentary session. The council of representatives is formed of the president of the National Assembly, definite members of the presidium and the delegates of the district circles.

The district circles elect a chairman from their midst. The chairman of the council of the representatives is the president of the National Assembly. It follows from the standing orders that Czechoslovak constitutional law considers both the district circles and the council of representatives organs of the National Assembly.

As regards the Soviet Union the members of both chambers organize groups in a similar manner, mostly by union or autonomous republics. It often occurs that at making a motion, or in a debate a member speaks on behalf of groups of members elected in one or more union republic. So members may speak for the groups of representatives of the Russian Federation and the union republic of Lithuania, the autonomous republics of Daghestan, Bashkiria and the Tartars, the union republics of the Ukraine and Moldavia, the union republics of Kirghizia, Kazakhstan and Byelorussia.

The standing orders of the People's Chamber of the German Democratic Republic and of the Polish Seym recognize other groupings. Here in accordance with the multi-party system the representatives are organized by political parties. The formation of political groups, the list of their members, the names of the chairman, deputy chairman and secretary have to be reported in writing to the presidium of the People's Chamber. Representatives who are not members of a political group or party may join a group or party as guests. Article 12 of the Polish standing orders in a rather taciturn way authorizes the representatives to organize clubs by their party allegiances. Article 13 declares that for an organization on other principles the agreement of the presidium of the Seym is required, which before taking a decision consults the seniors' council. Actually three clubs of representatives operate in the Seym, viz. that of the United Polish Labour Party, that of the United Peasant Party and as third the club of the Democratic Party. In addition, there is a club of non-party Catholic members, named *Znak* (sign). Rozmaryn mentions that before 1957 there were only territorial groupings of representatives in the People's Republic of Poland. With the revival of the multi-party system the need arose for placing groupings of representatives on a party basis. This purpose is served by the clubs and the circles of representatives. With the approval of the presidium of the Seym groups organized on the territorial principle are active even now. These groups embrace the members of the same *voivodship* (province), or of large urban

districts, irrespective of the party allegiance of the member. This organizational form is not compulsory.[21]

The earlier legal regulation and practice of the groups suggest that these organs are still at the first phase of their growth, and that there are ample potentialities for the expansion of their scope of functions and of their activities, even within the framework of the present regulation. In particular the form of groups, which has come into being in Hungary, and which lays stress on the territorial organization is predestined for the effacement of the dividing line still existing between the local organs and the supreme representative organ of state power. This form of organization lends itself readily for an exchange of experiences, for a systematic mutual study of the working methods, and what is perhaps of greatest importance, the real participation of the executive power, supervision, and of the representatives or delegates, and council members in the enforcement of the statute laws and other legal rules. It is exactly the territorial organization which prompts the representatives to stabilize their relations to the councils operating in their territory (i.e. not exclusively to the county council), to the enterprises, agricultural co-operatives and state farms, without taking charge of the functions of councils of any stage or their organs, to which they are not entitled anyhow.

However, the development of the committees and the territorial groups of representatives progress parallel with each other. The sectoral and territorial organization can be applied with the best result on the line of guidance and supervision. This result of organization should not be limited to the organs of public administration, but should be extended to all spheres where guidance and supervisions further the collection of experiences and their transmission take place. We may even say that in this way an opportunity will afford itself for a study of the experiences of the specialized agencies and the masses on both the horizontal and vertical plane. The dangers of over-organization are well known. Notwithstanding, the statement may be made that this duplication is useful, for in consequence of it the representative organ of state power can survey the problems from two aspects. Incidentally this is the way how the continual participation of the representatives in governmental operations can be realized.

[21] Stefan Rozmaryn, *Op. cit.*, pp. 17–8 and 61.

The dual (sectoral and territorial) work demands a dual network of activists. While in the committee in the first place the co-operation of scientific life, the prominent men of definite professions has to be enlisted, the groups of representatives should preferably mobilize the most prominent council members active in their territory.

The agencies operating at the side of the supreme representative organs of state power, at least the committees and the groups of representatives, in the last resort raise the problem of the publicity of the activities of the organs of state power. The discipline of socialist constitutional law rejects all kinds of closed parliamentarism and announces a structure of the supreme organs of state power which helps to establish relations to the population, both through the expression of the will of the workers in a statutory form (process of legislation), and in the enforcement of statutes and supervision. Among others here manifests itself the postulate of the unity of the organs of state power, viz. the same relations although in a different form are expected from the local organs of state sovereignty as from the supreme organs.

5. PRESIDENTS (CHAIRMEN), PRESIDIUMS AND OFFICERS OF THE LOCAL REPRESENTATIVE ORGANS OF STATE POWER

Locally the representative organs have the same ramifications as on the highest level. The only difference worth mentioning is that these organs appear in a more simplified form. Let us draw a comparison between the organization of the supreme and local powers: the council meeting, i.e. the plenum of the council corresponds to the plenum of the supreme representative organ of state power. Several traits of the substitutive presidium and the government coalesce in the executive committee on the level of the local organs. The opposite number of the president of the presidium of the supreme organ is the chairman of the council meeting, with a simplified and reduced sphere of functions. At both the supreme and the local representative organs of state power there are permanent and provisional committees. At the local organs the activities of the territorial groups of the representatives are restricted to the territorial functions of the delegates, or council members. In special instances, in Hungarian constitutional law

territorial committees, appear also at the councils in a branch-office form. This is a contingent and not general form. (In recent years territorial groups of the county, metropolitan, district, municipal and municipal district council members have been organized.) Apart from a few differences the supreme and local organizations appear in a similar form. Even these slight differences are not those of principle. This has to be pointed out because the postulate that in the structure of all types of organizations (supreme and local) the experiences of the governmental mechanism as a whole have to be utilized, relies on this statement. The methods which have stood the test at the local organs ought to be introduced, if possible, also at the supreme representative organs of state power, and vice versa. The overdone differentiation between the two organs, frequently encountered in certain products of popularizing legal literature, has acted as a drawback to the evolution of democratism at these organs. In particular as for the auxiliary organs operating at the side of the supreme and local organs of state power the common traits and requirements should be emphasized. Organs of this type are at the councils, the officers of the plenum, further the permanent and provisional committees.

The most prominent officer of the local representative organ is the chairman of the meeting. This office has been created in two forms in the socialist countries. In the one case the office is wholly independent of the general organ of public administration, in the other the chairman is an officer of the administrative organ, at the same time its chairman. (The two forms appear as a dual solution in the office of the president of the supreme representative organ of state power.) An example for the first form is Article 27 of the Statute of 1968 of the Russian Federation on rural soviets, according to which the soviet elects a president and a secretary for conducting the session. It is characteristic of the regulation that the resolutions of the soviet are signed by the chairman and secretary of the executive committee, however, the minutes of the session are signed by the president and secretary of the session (Article 31 of the Statute).

Unlike the provisions of the First Council Act of 1950 the Second Hungarian Council Act has segregated the functions of the chairman of the council meeting, elected in each case for the nonce, from those of the chairman of the executive committee at all stages (cf. clause (1) Sec. 14 Act X of 1954). Government Resolution No.

2007/1 1967 (I. 31) by special authority has discontinued this institution and declared that "the sittings of the council are in general conducted by the chairman of the executive committee of the council" (clause 3). By this the government has returned to the earlier system of merging the functions. The Hungarian standing orders, the Resolution No. 16 of 1954 of the Presidential Council of the People's Republic on the order of the council sittings (on the metropolitan, county, municipal, district, urban district, metropolitan and municipal district level) and in accordance with Sections 24 and 23 of Resolution No. 17 of 1954 of the Presidential Council of the People's Republic two council members are appointed for attesting the minutes of the council sitting. The chairman of the council sitting conducts the sitting, ensures order in it. On the motion of the chairman of the council the council sitting may exclude recalcitrant council members from the sitting. If the peace-breaker is not a council member, the chairman may proceed in this sense (Sections 24 and 23, respectively). The chairman of the council meeting has functions at the opening of the debate, the ascertainment of a quorum before putting the motions to a vote, at the suspension or closure of the meeting, at collecting the votes, and the announcement of the resolutions. In conformity with clause (3) Sec. 14 of the Second Council Act (1954) in case of an equality of votes the vote of the chairman of the meeting decides. The functions of the attestors of the minutes is very much the same as those of the clerk of the National Assembly: with their signatures they attest the minutes of the meeting and take part in counting the votes. The standing orders recognize the institution of a presidium of the council meeting. However, this is not an operative organ, but some sort of an honorary body formed of council members having an outstanding record (Sections 25 and 24).

In conformity with section 104 of the Constitution of the Serbian Republic the communal *skupshtina* elects its president from among its own members, who takes care of the organization of the operations of the organ and its councils, and their co-ordination, and supervises the work of the communal administrative organs.

According to Section 24 of the Rumanian Law of 1968 on the people's councils the executive committee presides over the session of the people's councils and the chairman of the executive committee signs the minutes of the session.

According to Sec. 12 of the German Law of 1957 a board has to be elected for conducting the meetings. This board consists of three representatives one of whom takes the chair.

The Polish Statute of 1958 on the people's councils has maintained the duality of the earlier Soviet method. In accordance with clause (2), Article 32, the people's council elects the president and secretary of the meeting, possibly for several sessions. In sessions of the rural people's councils the chairman of the rural people's council is in the chair. According to clause (3), Article 50 of the Statute, this is dignity of the chairman of the administrative organ of general competence (corresponding to the chairman of the Hungarian executive committee). If there is no quorum in the council meeting, the chairman appoints the date of the next meeting, he may decree an *in camera* sitting, may give leave to non-members to speak (clause (4), Article 32; clause (2), Article 33; and clause (1), Article 34).

Clause II/3 of the Bulgarian Instructions of 1951 on the preparation and the conduct of the sessions of the people's councils introduces a form very much the same as the Polish. Here too with the exception of the rural people's councils, the councils elect a president and a secretary (but not a presidium). The president of the meetings of the rural people's council is the chairman of the people's council (in the same way as in Poland); no secretary is elected. The rights and duties of the president and the secretary, if any, are laid down in the domestic statutes approved by each people's council. The president and the secretary—except in rural councils—sign the minutes of the council meeting.

In accordance with clause II/16 of the German standing orders of June 28, 1961 a presidium of five members has to be elected in the meetings of the representative organs, whose permanent member is the president of the council, or in urban districts, the chief burgomaster. Excepted are the meetings of the representative organs of towns and communities subjected to the region. Here a presidium of three members is elected with the burgomaster as permanent member.

The second form has been carried into effect most consistently by the Czechoslovak statutory regulation. In like manner as in the case of the presidium of the National Assembly the substitutive organ corresponding to the Hungarian Presidential Council and the institu-

tion conducting the sittings of the National Assembly coincided, Sec. 45 of the Act of 1967 on national committees has entrusted the president of the administrative organ of general competence—i.e. the president of the national committee—with conducting the meetings of the national committee. The president signs the decrees and other resolutions of the national committee jointly with the secretary.

Both forms, together with a third of a transitory character, are associated with the ideas of the division and organization of the governmental mechanism. During recent years also in the statutory regulations a diversity of ideas has turned up in the distribution and definition of the functions of the organs of the state power and public administration. This on the other hand has led to the merging of certain earlier organs with others, or creation of new types of organs. All this is reflected in the variegated forms discussed earlier.

6. PERMANENT AND PROVISIONAL COMMITTEES IN THE LOCAL REPRESENTATIVE ORGANS OF STATE POWER

Among the own organs operating at the side of the local representative organs of state power the permanent and provisional committees have acquired increasing importance and are likely to become even more important in the future. In the past decade a number of monographs[22] and shorter papers dealt with the jurisdiction, organization and operating methods of the committees. Several polemical treatises have been published in Hungarian, yet mainly in Russian, which have suggested smaller or greater changes in this sphere. A discussion of the problems of detail of the committees of the councils is a subject outside the scope of this work. It is preferred to mark out the trend in evolution. Earlier summarizing statements on the committees of the Hungarian councils will simply be quoted, whereas subsequently

[22] A. V. Luzhin, *Постоянные комиссии местных советов деиутатов трудящихся* (The permanent committees of the soviets of the workers' deputies), Budapest 1952; Yu. V. Todorski, *Постоянные комиссии местных Советов деиутатов трудящихся* (The permanent committees of the local soviets of the deputies of the workers), Moscow 1955; Lucie Haupt, *Die ständigen Kommissionen der örtlichen Organe der Staatsgewalt*, Berlin 1956; Otto Bihari, *A tanácsok bizottságai* (The committees of the councils), Budapest 1958.

an attempt will be made to sum up the current trends and joint issue with wrong opinions.

According to a definition (published by this author in 1958) "the committees of the Hungarian councils are the subsidiary organs of the local organs of the state power, i.e. the councils, operating in a collegiate form, which assist the council in an advisory, consultative and supervisory capacity and one of the principal goals of which is the extensive enlistment of the working people in governmental work".[23] This was completed with the statement that the committees perform their activities mostly and generally by a sectoral division.[24]

The controversy centres in general round two sets of problems, viz. (a) whether or not the membership of the committees should be extended beyond the membership of the council, and (b) whether or not the rights of the committees should be extended beyond their actual scopes by the addition of an autonomous competence or official jurisdiction. As far as the committees are concerned these problems are the most important ones, and therefore they will have to be tackled without hesitation.

Of the statutory provisions enacted recently, the regulation of 1968 of the Russian Federation concerning the rural soviets and the Rumanian statute of 1968 on the people's councils have taken a definite position for the election of the committee members exclusively from among the council members. On the other hand clause (3) Article 38 of the Polish Statute on people's councils has not disposed of the participation of delegates. ("Persons not pertaining to the council may also be elected on the committee in a number not exceeding one half of the total number of members. The chairmen of the committees are elected by the people's council from among the council members.") Nor has clause (1) Sec. 55 of the Czechoslovak Statute of 1967 on the national committees. ("The national committee elects the members of the specialized committees from among the representatives and, in the first place from among such further citizens, who have been proposed by the social organizations. The majority of the members of the specialized committees shall be representatives.") Clause (2) of the same section decrees that the chairman of the specialized com-

[23] Otto Bihari, *Op. cit.*, p. 64.
[24] *Ibid.*, pp. 66–8.

mittee should be a representative of the national committee.—In the German Democratic Republic the Statute of 1957 on the local organs of state power introduces two methods. According to clause (b) Sec. 7 the chairmen and members of the permanent and provisional committees are elected from among the representatives by the local organ of popular representation, except the small communities, where also other citizens may be elected on the committees. According to clause (1) Sec. 3 of the first appendix to the Directives of 1957 "on the operating order of the permanent committees of the local organs of popular representation": where the representation has not more than twenty-five members also non-representatives may be elected on the permanent committee, however, only one representative may be elected chairman.—The standing orders issued by virtue of the Decision of June 28, 1961 of the Council of State of the German Democratic Republic decree partly that the local representative organ elects the permanent and provisional committees from among its members and substitute members, partly that on the motion of the permanent committee the representative organ may invite as fully qualified members non-delegates, up to one third of the membership (clauses I/7,c and IV/7 of the standing orders of regions, towns of district right and districts, further clause I/7c of the standing orders of towns and communities subordinate to the district, and also clause IV/10 of the latter, however, here with the difference that the number of non-delegate committee members may amount to one half of the total membership). The executives of the specialized agencies may be elected or invited on the permanent committee corresponding to their sphere of activities (clause IV/3f of the standing orders—except those of the towns and communities subordinate to the district, where this provision has not been taken up).

As will be seen Czechoslovak legislation has changed earlier practice not only insofar as it has thrown open the gates to non-representatives, but also by that it has abolished the earlier cases of 'exclusion' in respect of the members of the organs of public administration of general competence and the executives of the specialized agencies, and has invited these expressly to a participation in the management of the affairs of the committees.—The same ideas manifest themselves in the standing orders in the German Democratic Republic. At the same time, setting out from the idea that the local council (the organ

corresponding to the Hungarian executive committee) is developing "to the political and organizational centre of popular representation",[25] which necessarily guides and co-ordinates the operations of the particular committees,[26] certain authors suggest the election to the chairmanship of the permanent committee of the deputy chairman or the member responsible for the specialized sector.[27]

It seems that the two sets of problems, viz. the committee membership of non-council members and the election of the deputy chairmen or members of the executive committee to presidents of the committee may be traced back to a common root. And this is to a certain degree the undervaluation of the independence of the council as the representative organ of state power and of the rights of the delegates. If in a certain respect the conduct of the affairs of the committee developed in a way as if any industrious member of the council were unable to perform these functions and that it would be best if a preferably exempted member of the executive committee advanced this work, with his authority, then on the other side the impression may be supreme as if each citizen equally enjoyed the rights and were carrier of the obligations which the working people conferred on its delegate. Therefore the role of the rights and obligations of the delegates must not be undervalued.

As regards the automatic election of the members and deputy chairmen of the executive members to the president of the committee, the German author quoted above sets out from an altogether different basic principle. He writes as follows: "The transfer of responsibility in the vertical sense from the superior organs of state power to the inferior organs insists on the transfer of the responsibility also in the horizontal sense from the popular representation to the permanent committees or the council."[28] This thesis is not properly founded. What the course of evolution exactly demands is that responsibility should not be shifted to organs of a narrower scope and staffed with

[25] Cf. Harald Riedel, Die Verstärkung der Rolle der ständigen Kommissionen der örtlichen Volksvertretungen, *Staat und Recht* 1961, No. 7, p. 1303.

[26] Wolfgang Weichelt, Ein weiterer Schritt in der Entwicklung des demokratischen Zentralismus, *Staat und Recht 1961*, No. 6, p. 1103.

[27] Harald Riedel, *Op. cit.*, p. 1304. (It should be noted that this idea has not been taken up in the German standing orders.)

[28] *Ibid.*, p. 1297.

a small number of members. Experience accumulated in the people's democracies has confirmed that no particular preponderance of the representative organs could be noticed. It has been rather the extremely strong position of the organs of public administration, among them the executive committees and their exempted executive that occasionally hampers true collective work in the plenums of the local representative organs of state power. A fair number of legal provisions of the people's democracies has made the elimination of this risk its goal (so Act X of 1954 in Hungary, Statute No. 16 of 1958 of the People's Republic of Poland, etc.). A trend to the contrary would amount to jettisoning the most valuable experiences, and would at the same time run counter to the general regularity of the actual phase of socialist state-building.

All this does not mean some sort of a position against public administration. The undervaluation of the actual function of the executive committee or the specialized agencies would amount to the disorganization of governmental work. Even a reshuffling of competences has to be carried through in a considered manner and by stages. This is not contradicting the general task that guarantees have to be taken up in the statutory provisions for the safeguard of the competences and rights of the elected representative organs of state power. No theoretical consideration may serve as the occasion for allowing the tasks of an elected corporate organ to slip over into the hands of a single person, who is anyhow in possession of by no means limited rights. It is not a member of the executive committee who should reconcile the work of the permanent and provisional committees, moreover that of the council or the specialized agencies. In fact it is the right and duty of the council to elaborate general and, in cases of importance, detailed rules of conduct for the executive committee, the committees and the specialized agencies. If the representative organs of state power are concerned with such and similar tasks, then their activities will be rich in content. Naturally this will necessitate the increase of the number of their sessions and sittings.

Another, and for the future development of the committees even more urgent, problem is that of the competence of the committees. In this respect there were controversies for a few years. In the discipline of constitutional law in both the Soviet Union and the people's democracies a growing number of authors insist on the endowment

of the committees, in particular of the permanent committees, with actual competences in public administration. In this case, while maintaining their earlier advisory, consulting and supervisory rights, the committees would take charge of part of the authority and competence of the local organs of public administration. This would not mean any extension of the competence of the organs of the council (this is a problem wholly independent of this solution), but merely a redistribution of the existing competences. It is beyond doubt that in the first place the competences of the specialized agencies would be shifted to the committees, i.e. the unipersonal competence of the executives of the specialized agencies and the collective decision of the committee would be divided in a reasonable way. In matters whose satisfactory solution has been entrusted so far to the personal responsibility of the chief executive of the specialized agency, this method would be discontinued, and superseded by the collective responsibility of the committee. In these instances the specialized agency would have to answer merely for the way how a resolution has been enforced. However, later on most of the enforcement could be taken over by the committee with its activists. Undoubtedly the reshuffling of competences would necessarily entail a metamorphosis of the paid, exempted machinery of state administration and also a reduction of its staff.

Further shifts would also take place in connexion with the re-assignment of competences. Since the permanent committee would not merely be a subsidiary organ of the representative organ of state power, but a genuine organ of public administration with the right to perform administrative acts, also the method of supervision of the activities of these organs would have to be defined, which could take place only in the horizontal sense, but never in the vertical sense. Also the plenary sessions of the councils will have to be convened at greater frequency, and often the discussion of the administrative activities of each committee will have to be put on the agenda. It cannot be argued that in this case a definite right of supervision and instruction will have to be conferred on the executive committee that proceeds in administrative matters.

However, so far little has materialized of this notion of the permanent committees in the statutory provisions. In reality the notion turns up in this form only in the statutory regulation of the Czechoslovak

Socialist Republic. Clause (3) Sec. 95 of the Constitution reads as follows: "The specialized committees are the initiating, supervisory and *executive* agencies of the national committee in certain branches or phases of their activities. To this end the necessary competence has been vested in them . . . The specialized committees are responsible to the national committee and to the *council.*"[29] Statute Law No. 65 of 1960 on the national committee brings under regulation this matter in its details: "The specialized committees are the initiating, executive and supervisory agencies of the national committee, which have a deciding competence vested in them for the management of the scope for which they have been created" (Sec. 31). "Within their competence the specialized committees may pass resolutions and take measures, further give binding instructions to the chiefs of the competent department of the national committee and to the executives of enterprises and institutions directed by the national committee" (Clause (2) Sec. 33); (Sec. 54 of Statute Law No. 69 of 1967 has emphasized their initiating, supervisory and executive functions). Jičinský has sized up the earlier provision as the growing dependence of the mechanism on the elected organs and the wholesale subordination of their operations to these organs.[30] Bertelmann points out that in communities of more than about ten thousand inhabitants, where the organization of public administration has no departments, the executive character of the specialized committees is of greater significance than elsewhere; on the other hand at the national committees the departments are important subsidiary organs in the course of the exercise of the functions of public administration. They extend their assistance even to the committees. There is no relation of subordination or superordination between the specialized committees operating on a higher or a lower level.[31] (On the Yugoslav pattern the councils of the communal *skupshtinas* are expressly 'political executive organs'—in conformity with Section 106 of the Serbian

[29] Italics by the author.

[30] Zdeněk Jičinský, Les Comités Nationaux et la nouvelle constitution de la République Socialiste Tchécoslovaque, *Bulletin de droit tchécoslovaque 1960*, Nos 1–2, p. 95.

[31] Karel Bertelmann, Eine neue Etappe in der Entwicklung der Nationalausschüsse der Tschechoslowakischen Sozialistischen Republik, *Staat und Recht 1961*, No. 2, p. 250.

Constitution. These councils are formed partly only of *Skupshtina* representatives. They perform public-administrative functions only when this is expressly decreed by statute or a resolution of the communal *Skupshtina*.)

In the German Democratic Republic the writers follow about the same course. The position taken by Riedel defines the process rather pithily and says that it is ". . . the metamorphosis of the permanent committees from the subsidiary organs of the agencies of popular representation to leading organs, i.e. organs which—on the ground of resolutions of the organ of popular representation, the council and the higher organs of state power—lead certain spheres of social life."[32] (Incidentally in the literature of constitutional law in the German Democratic Republic there is ample reference in connexion with this subject-matter to examples of Czechoslovak legislation.)

As the initial step the competence of the specialized agencies should be examined here on the ground of the normative acts which they actually issue and which interest and affect the widest strata of the population. In the first place these competences ought to be transferred to the permanent committees. This settlement would entail a significant change in the pattern of management and guidance by the council. Simultaneously with the growth of the intensity in the committee work of the council, provisions will have to be made for the consolidation and extension of the network of activists.

The problem of the method of organizing committees has to be reviewed, too. Earlier the advantages of the depertmental system of committees have been made clear.[33] To this we may add that the transfer of some of the competences of public administration to the permanent committees thrusts the postulate of a reinforcement of the sectoral character of the committees, with special regard to the actual divisions of the specialized agencies, even more into prominence. This does not want to say that this is the only form of the definition of committee functions. Reference has been made to the mandates committee existing in practically all socialist countries, and to the committee of incompatibility in Hungary, not to speak of the many

[32] Harald Riedel, *Op. cit.*, p. 1299.
[33] Otto Bihari, *Op. cit.*, pp. 67–8.

provisional committees of various types and often entrusted with complex functions.

The territorially organized committees of the council are gathering in importance. In principle these committees generally resemble the groups of representatives. The Hungarian branch committees (Law-decree No. 19 of 1955) are essentially permanent committees, with territorial functions. The Polish village headman (clause (2) Article 72 of Statute Law No. 16 of 1958) differs from the Hungarian branch committees in that he is not necessarily a council member. However, experiences so far obtained indicate that the mobilization of the population on a territorial basis may be very efficacious.

The life of a socialist State is inconceivable without the operation of the own organs of the representative bodies of state power. In the building of the socialist State—actually and for many years to come—much depends on how—with the aid of the own organs—direct democracy can be tied up with the democratic operation of the socialist representative organs, and on how by this means preparations can be made for the introduction of the various forms of self-administration, to be carried into effect at a later stage.

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